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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

D.M.,
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED

1. Is information that a suspect is carrying a gun insufficient to satisfy the reasonable suspicion standard under Terry v. Ohio?

(Answered in the affirmative by the Supreme Court of Pennsylvania).

2). Is the respondent's headlong flight upon seeing police irrelevant for purposes of determining reasonable suspicion under Terry v. Ohio?

(Answered in the affirmative by the Supreme Court of Pennsylvania).

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ORDERS AND OPINIONS BELOW

The December 27, 1999 order and majority and dissenting opinions of the Supreme Court of Pennsylvania, which reversed the Superior Court of Pennsylvania, are reproduced at App. 1. The January 30, 1998 order of the Superior Court of Pennsylvania denying respondent's petition for reargument is reproduced at App. 17. The November 19, 1997, order and opinion of the Superior Court affirming the denial of respondent's suppression motion and his adjudication of delinquency is reproduced at App. 18. The opinion of the suppression court, the Court of Common Pleas of Philadelphia, Juvenile Division, is reproduced at App. 32.

STATEMENT OF JURISDICTION

This is a state criminal prosecution in which respondent filed a motion to suppress an illegal handgun in the trial court, the Philadelphia Court of Common Pleas, Juvenile Division, on the ground that police lacked reasonable suspicion to conduct a Terry stop. On October 2, 1996, the trial court denied suppression and subsequently adjudicated respondent delinquent for carrying a firearm without a license, carrying a firearm on a public street, and possession of a firearm by a minor.

Respondent appealed to the intermediate state appellate court, the Superior Court of Pennsylvania, which affirmed the suppression ruling and adjudication of delinquency on November 19, 1997. Respondent filed a petition for reargument which was denied by the Superior Court on January 30, 1998. Respondent then filed a petition for allowance of appeal in the Supreme Court of Pennsylvania, which the Court granted. After briefing and oral argument the Pennsylvania Supreme Court, on December 27, 1999,

reversed the decision of the Superior Court. It held that the Fourth Amendment did not permit a stop and frisk where an anonymous report was made that a particularly described person was carrying a gun at a specific location, even after police observed that respondent matched the description of the reported gunman and was at the exact location reported. The Court further held that the additional fact that respondent fled immediately after police arrived was irrelevant because neither the tip itself, nor the officer's observations corroborating the tip, had been sufficient to arouse suspicion.

The opinion of the Pennsylvania Supreme Court refers to both the Fourth Amendment and the similarly-worded Article I, § 8 of the state constitution. However, the opinion includes no plain statement that the decision was based on an independent state ground and, in fact, explicitly stated that the inquiry for determining the existence of reasonable suspicion for a Terry stop is the same under the Fourth Amendment and the state constitution. In Re D.M., 743 A.2d 422, 425 (Pa. 1999)("In determining whether reasonable suspicion exists for a Terry stop, the inquiry is the same under Article I, Section 8 of the Pennsylvania Constitution or the Fourth Amendment of the United States Constitution"). This is entirely consistent with prior decisions in which the Pennsylvania Supreme Court has repeatedly held that, in the area of stop and frisk, the state constitution is entirely coextensive with the Fourth Amendment. See Commonwealth v. Cook, 558 Pa. 50, 735 A.2d 673, 675 (1999); Commonwealth v. Jackson, 548 Pa. 484, 698 A.2d 571, 573 (1997); Commonwealth v. Morris, 537 Pa. 417, 644 A.2d 721, 724 n.3 (1994), cert. denied, 513 U.S. 1031 (1994); Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969).

This Court has jurisdiction to review the final judgment of the Supreme Court of Pennsylvania based on its construction of the federal Fourth Amendment pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania seeks certiorari for a determination of whether an anonymous report of a "man with a gun" is sufficient to justify a Terry stop where police confirm both the description and location of the alleged gunman as stated in the report. This same issue was argued before this Court in Florida v. J.L., No. 98-1993 on February 29 of this year, and this Court's ruling in J.L. will be determinative of this issue and resolve a split among the jurisdictions that have considered this issue.

The Commonwealth further seeks review of the Pennsylvania Supreme Court's determination that flight is not a

relevant factor under Terry v. Ohio, 392 U.S. 1 (1968), which is in direct conflict with this Court's recent decision in Illinois v. Wardlow, No. 98-1036, 2000 U.S. LEXIS 504 (decided January 12, 2000). Regardless of the outcome in J.L., the Pennsylvania Supreme Court's Fourth Amendment analysis is fatally flawed under Wardlow.

The facts of this case are as follows. On June 24, 1996, at about 6:00 p.m., Philadelphia Police Officer Christopher Frazier received a call over police radio instructing him to investigate a report of a male on the corner of 28th Street and Cecil B. Moore Avenue who possibly had a handgun. The suspect was described as a black male, wearing a white T-shirt, blue jeans and white sneakers. Upon receiving this call, Officer Frazier was only a block away and arrived at the reported location within approximately four seconds. The officer immediately noticed that respondent was the only male on the corner and that he matched precisely the description broadcast over police radio (N.T. 10/2/96, 4-6).

Officer Frazier, who was in uniform, got out of his police vehicle and asked respondent to "come here." Respondent, however, immediately ran away from the officer. Officer Frazier pursued him and was soon joined by another officer, who approached respondent from the opposite direction. Cornered between the two officers, respondent hesitated, but eventually complied, when Officer Frazier instructed him to put his hands in the air. The officer then ordered respondent to place his hands against a parked car and, for his own safety, conducted a pat-down search of respondent's outer clothing. While doing so, Officer Frazier felt a hard object in respondent's crotch area, which he immediately recognized as a handgun. A silver .32 caliber handgun with a brown grip fell out of respondent's right pant leg

and was recovered by Officer Frazier. Respondent was then placed under arrest (N.T. 10/2/96, 6-8).

The Pennsylvania Supreme Court held that the officers violated the Fourth Amendment. In analyzing the above facts under Terry, the Court applied its previously adopted view of Terry, which precludes police from relying on an anonymous tip, even though the tip provides a physical description of the suspect and an exact location where he can be found, which information is subsequently confirmed by police. The Court reasoned that, absent a "firsthand" observation of suspicious conduct, the police cannot make a Terry stop. In Re D.M., 743 A.2d at 425-426. As for respondent's flight from police, conduct this Court has held to be a significant factor under Terry, the Pennsylvania Supreme Court glibly observed, "[i]n the absence of any factors indicating that the officer suspected criminal activity was afoot, the 'additional factor' of flight is **not relevant** to the determination of reasonable suspicion." 743 A.2d at 426 (emphasis added).

Pennsylvania is one of a few jurisdictions that hold that police may not respond to an anonymous report of a "man with a gun" by making a Terry stop of a person found to match the description of the gunman at the exact location contained in the report. These jurisdictions purport to refuse to adopt a "gun exception" to the requirements of Terry. The vast majority of jurisdictions that have considered this issue, however, view the report of a gun as a natural component of the reasonable suspicion analysis, and have found that police may make a Terry stop under such circumstances. This very issue is currently before this Court in Florida v. J.L., No. 98-1993, and was argued on February 29, 2000.

With its decision in this case, moreover, the Pennsylvania Supreme Court has also departed from the majority of jurisdictions that view flight as an important, even critical, factor in determining reasonable suspicion, electing instead to consider a suspect's flight from police to be largely irrelevant under the Terry analysis.[1] That view, however, has been repudiated by this Court in its recent decision in Illinois v. Wardlow, No. 98-1036, 2000 U.S. LEXIS 504 (2000), which made clear that flight from police is a suspicious circumstance which is a pertinent factor in determining the existence of reasonable suspicion.

REASONS FOR GRANTING THE WRIT

I. A REPORT OF A MAN WITH A GUN SHOULD PERMIT A TERRY STOP.

It hardly needs to be said that police can approach a person for investigation if they are aware of articulable facts that would support reasonable suspicion of criminal activity. They may briefly stop the person in order to investigate further; and may frisk for weapons if they reasonably suspect that the person may be armed and dangerous. Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

Reasonable suspicion is supposed to be a "commonsense, non-technical" concept. Ornelas v. United States, 517 U.S. 690, 695 (1996); United States v. Cortez, 449 U.S. 411,

[1] A similar view of flight has been expressed by a few other jurisdictions. See e.g., State v. Hicks, 241 Neb. 357, 488 N.W.2d 359 (1992), cert. denied, 507 U.S. 1000 (1993); People v. Shabaz, 424 Mich. 42, 378 N.W.2d 451 (1985), cert. dismissed, 478 U.S. 1017 (1986).

417-418 (1981). Common sense would seem to advise that, in today's world, a report of a gun would add significantly to the reasonable suspicion analysis. In many jurisdictions courts have so held.

But in a few states where the question has been addressed, courts have concluded that a report of a gun is completely irrelevant to the decision to make a Terry stop.

Pennsylvania is in the forefront of this minority view. In the landmark case of Commonwealth v. Hawkins, 547 Pa. 652, 692 A.2d 1068 (1997), a then-plurality of the Pennsylvania Supreme Court abjured the notion that the presence of a gun supports suspicion of criminal activity. The Court ridiculed fears of "maniacs who may spray schoolyards with gunfire," and dismissed the contrary view as "radical" "fanciful" "shocking" and "histrionic." It complained that a report of a man with a gun might be nothing more than a "prank," since "anyone can describe a person who is standing in a particular location" and claim that they have a gun. It further noted that concealed guns are not illegal in Pennsylvania -- that is, if the gunman is licensed. The Court concluded that there is "no gun exception" to Terry. 692 A.2d at 1070-1071.[2]

[2] The dissent responded to the plurality's ridicule of the notion that "maniacs" might attack a school by pointing out that, in March 1997, a group of heavily armed men shot 11 police officers and 6 innocent bystanders while robbing a bank. In February 1997 a gunman opened fire at the Empire State Building, wounding 7 people. 692 A.2d at 1071.

All of this of course occurred long before the April 1999 tragedy in Littleton, Colorado, in which two armed students went on a lethal rampage at a high school.

These sentiments commanded a majority in Commonwealth v. Jackson, 548 Pa. 484, 698 A.2d 571 (1997). In that case, which was deemed "factually indistinguishable from Hawkins," the Court rejected the notion that "police have reasonable suspicion to conduct a stop and frisk pursuant to Terry v. Ohio ... based solely on an anonymous tip that a person matching the suspect's description is carrying a gun." The Court explained that the danger of firearms was "already factored into the balance" of Terry, and so adds nothing to the reasonable suspicion analysis. To hold otherwise would be "in reality to overrule Terry[.]" 698 A.2d at 575.

Florida has followed Pennsylvania's lead. In J.L. v. State, 727 So.2d 204 (Fla. 1998), cert. granted, 120 S.Ct. 395 (1999), the Supreme Court of Florida, in a per curiam ruling, "join[ed] the Supreme Court of Pennsylvania in rejecting" the supposed "firearm exception" to Terry. 727 So.2d at 209.[3] This Court granted the State of Florida's petition for writ of

[3] In reaching its interpretation of Terry, the Florida Supreme Court quoted with approval the Pennsylvania Supreme Court's scorn for the notion that the likely presence of a gun should be weighed in the reasonable suspicion analysis:

> [I]t is difficult to see where this shocking idea originates, notwithstanding the Commonwealth's fanciful and histrionic references to maniacs who may spray schoolyards with gunfire and assassins of public figures who may otherwise go undetected. Even if the Constitution of Pennsylvania would permit such invasive activity as the Commonwealth proposes - which it does not - such activity seems more likely to endanger than to

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certiorari, and heard argument on the case on February 29, 2000.

Cases like Hawkins, Jackson, and J.L. are the minority view. Most federal courts have followed reasoning similar to that in United States v. Clipper, 973 F.2d 944 (D.C. Cir. 1992), cert. denied, 506 U.S. 1070 (1993)(anonymous tip that suspect in green jacket and black hat was carrying a gun). There the Court recognized that a police officer investigating a "man with a gun" call is on the horns of a dilemma. "He must either stop and search the individual or at best follow him through the streets ... hoping he [will] commit a crime, or at least brandish the weapon, out of doors, where the police can intervene." For the Court in Clipper,

> This element of imminent danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in "controlled buys." Where guns are involved, however, there is the risk that an attempt to "wait out" the suspect might have fatal consequences.

973 F.2d at 951.

The notion that a report of a man with a gun should not be considered suspicious because some people may be

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> protect the public.

727 So.2d at 209, quoting Hawkins, 692 A.2d at 1071.

licensed to carry firearms overlooks the reality that only a very small portion of the population in Philadelphia is licensed to carry a gun. In this regard, the dissenting justices in Commonwealth v. Hawkins, supra made the following observations:

> The Majority implies that a tip that a man is carrying a gun is not an allegation of criminal activity in Pennsylvania. However, an overwhelming majority of Pennsylvanians are not licensed to carry concealed weapons. In 1995, there were 569,817 licenses to carry concealed firearms in Pennsylvania, which represents between 3-5% of the population. Furthermore, this "man with a gun" call occurred in Philadelphia, where a person must have a license to carry a firearm, whether it is concealed or unconcealed. 18 Pa.C.S. § 6108.... Less than one percent (1%) of the population of Philadelphia is licensed to carry a concealed firearm.

Id., 692 A.2d at 1075-1076 (Newman, J., dissenting) (footnotes omitted). Given that less than one percent of the population in Philadelphia is licensed to carry a gun, a report of a "man with a gun" at least gives rise to a reasonable probability, indeed, almost a certainty, that the person reported to be carrying a gun is unlicensed. Accord United States v. Bold, 19 F.3d 99, 104 (2d Cir. 1994) (upholding stop and frisk of man with a gun; observing that while it is certainly possible to obtain a gun license in New York, the

overwhelming majority of people there are not licensed to carry handguns).[4]

The courts have also considered the argument that "anyone with a grudge" could "fabricate a tip whose neutral details" would be easily corroborated. But such pranksters run the risk of prosecution, and it is sophistry to suggest that fabrications are the norm. United States v. Clipper, 973 F.2d at 951. Where a gun may be present, the reasonable choice is for the police to stop and frisk the suspect.[5]

[4] In addition to the statistical improbability that a person carrying a concealed handgun on a public street in Philadelphia had a valid gun license, the nature of the tip itself gives rise to a reasonable inference that the gun was, at some point, not safely concealed on respondent's person, but was being brandished in a manner to cause the person making the anonymous report to be sufficiently alarmed to feel the need to call the police. It is certainly reasonable for an officer responding to such a call to conclude that the most likely basis for the information he received over police radio would be the tipster's having personally observed the gun being displayed by respondent.

It should also be noted that respondent was a juvenile at the time of his arrest and, under Pennsylvania law, it is illegal per se for a minor to possess a gun. See 18 Pa.C.S. § 6110.1(a).

[5] It must also be recalled that reasonable suspicion focuses on the facts as they appear to the officer at the time of the stop, not as they would appear after investigation in depth. The possibility that seemingly reliable information might be false -- e.g., that citizens living in high-crime areas are routinely calling police as a "prank," as if they did not have any real crime to report -- has no more bearing on the analysis than the possibility that suspicious

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conduct might have an innocent explanation:

> Clearly, the officers were not required to rule out all possibility of innocent behavior before initiating a brief stop ... The test is founded on suspicion, not probable cause. Even if it was equally probable that the vehicle and its occupants were innocent of any wrongdoing, police officers must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.

United States v. Holland, 510 F.2d 453, 455 (9th Cir. (1975), cert. denied, 422 U.S. 1010 (1975).

As more recently explained by the Court in United States v. McBride, 801 F.2d 1045, 1047 (8th Cir. 1986), cert. denied, 479 U.S. 1100 (1987)(citations omitted):

> [I]t is immaterial that the details corroborating an informant's tip are as consistent with innocent conduct as with illegal activity. Courts have recognized that persons through malice might fabricate tips and meet this test for corroboration by adding neutral information such a location or vehicle description ... but those courts have also recognized that the choice for police is between making limited investigatory stops and ignoring citizen tips. Some criminal conduct is inherently impossible to verify by visual observation alone.

The proper analysis, therefore, is that even if the report might be a fabrication, the officer acts properly if he or she acts upon facts that appear reliable and would warrant an investigatory stop.

Thus, the report of a gun justifies a stop and frisk not because it increases the quantum of suspicion, but because it increases the quantum of danger. The Terry stop and frisk is a creature of the "unreasonable searches and seizures" clause of the Fourth Amendment, and it is plainly reasonable -- indeed, the most everyday commonsense -- to take greater precaution the greater the potential harm. The added urgency presented by guns has been recognized by Professor LaFave as a valid consideration in the reasonable suspicion determination:

> [I]n some instances the need for immediate action may be so great that substantial doubts about the reliability of the informant or his information cannot be permitted to stand in the way of prompt police action. ... Certainly a stopping for investigation will be the least intrusive effective means of dealing with certain special situations, such as a major bomb scare or the kidnapping of a child, and thus there is good reason to acknowledge that lesser evidence than is otherwise required may be used in such situations ... courts have most frequently relied upon [this] rationale to permit investigative stops to be made on the basis of an anonymous call that a certain person at a certain place was armed with a gun.

LaFave, Search and Seizure (West, 1987), § 9.4(h) at 229.

This view is consistent with that of other federal courts that have considered this issue. E.g., United States v. DeBerry, 76 F.3d 884, 886 (7th Cir. 1996)(where there is a report of a man with a gun, a Terry stop "strike[s] the proper

balance between the right of the people to be left alone and their right to be protected"); United States v. Gibson, 64 F.3d 617 (11th Cir. 1995), cert. denied, 517 U.S. 1173 (1996) (Terry stop proper where anonymous tip reported possibly armed men and suspects matched description given, despite absence of prediction of future conduct). See also United States v. Bold, 19 F.3d 99 (2d Cir. 1994).[6]

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[6] State courts that have considered the issue also have held that a report of a gun weighs heavily in the Terry analysis. The Supreme Judicial Court of Maine concluded that the choices the police must face when responding to a "man with a gun" call must be resolved "in favor of the limited intrusion on privacy represented by a stop and pat-down for concealed weapons." State v. Hasenbank, 425 A.2d 1330, 1334 (Me. 1981). The New Jersey Supreme Court explained:

> Where a weapon or explosive is involved it would be folly to say that the police should be compelled to ignore information, though from an anonymous source, and do nothing to protect the public under penalty of the suppression of evidence if they do what their duty reasonably demands.

State In The Interest Of H.B., 75 N.J. 243, 381 A.2d 759, 763-764 (1977). The Supreme Court of Hawaii held that the police are "duty-bound" to make an investigatory stop of a person anonymously identified as carrying a gun. State v. Kuahuia, 62 Haw. 464, 616 P.2d 1374, 1375 (1980). In People v. Smithers, 83 Ill.2d 430, 47 Ill.Dec. 322, 415 N.E.2d 327, 332 (1980), the Supreme Court of Illinois ruled that the reported presence of a gun "casts a heavy weight in favor of the reasonableness" of police action under Terry. "We should evaluate the officers' actions in light of one's reaction had they failed to act." Accord State v. Franklin, 41 Wash.App. 409, 704 P.2d 666, 669 (1985) (collecting cases);

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This Court, as well, in contexts other than Terry, has recognized that potential danger to police or members of the public at large may sometimes justify police action that would otherwise be constitutionally impermissible. See, e.g., Maryland v. Buie, 494 U.S. 325, 337 (1990)(police may conduct protective sweep of house during an arrest, without a search warrant or probable cause to search the house, where they have "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene"); New York v. Quarles, 467 U.S. 649 (1984)(recognizing public safety exception to requirement of Miranda warnings prior to custodial interrogation where questions are necessary to ensure safety of police or that of the public); Cupp v. Murphy, 412 U.S. 291, 295 (1973)(noting long line of cases recognizing exception to warrant requirement for search incident to arrest based upon reasonable expectation of police that person being arrested may use any weapons he has against them or may try to destroy any incriminating evidence in his possession).

In Cady v. Dombrowski, 413 U.S. 433 (1973), this Court held that the possible presence of a gun in a rented automobile, whose driver (a police officer from another jurisdiction) had been in an accident and was arrested for drunk driving, justified a warrantless search of the trunk of the

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People v. D.F., 933 P.2d 9 (Colo. 1997); In re. J.L.G., 209 Ga. 565, 434 S.E.2d 126 (1993); Allen v. State, 85 Md.App. 657, 584 A.2d 1279 (1991), appeal denied, 323 Md. 1, 590 A.2d 158 (1991); People v. Salaman, 71 N.Y.2d 869, 527 N.Y.S.2d 750, 522 N.E.2d 1048 (1988); State v. Pulley, 863 S.W.2d 29 (Tenn. 1993); Scott v. Virginia, 20 Va.App. 725, 460 S.E.2d 610 (1995).

vehicle based upon concerns for the safety of the public. In pertinent part, the Court's reasoning was as follows:

> The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required.... Where, as here, the trunk of an automobile, which the officer believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.

Id., 413 U.S. 448. Conversely, in Welsh v. Wisconsin, 466 U.S. 740 (1984), the Court concluded that where minor offenses are involved it would be unreasonable to allow police to make a warrantless entry into the suspect's home to make an arrest, holding that the gravity of the underlying offense is itself an important factor in determining the existence of exigent circumstances which would excuse a warrant. 466 U.S. at 750-753.

The same standard of "reasonableness," the same clause of the Fourth Amendment, supports the conclusion of the majority view that the danger inherent in a gun report makes it reasonable for police to stop and frisk a person matching the description of the reported gunman, to ensure both their own safety and that of the public. Terry itself emphasized the need to balance the safety of police officers and the public in determining the propriety of a stop and frisk:

> Certainly it would be unreasonable to require that police officers take unnecessary risks in

> the performance of their duties ... [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.

392 U.S. at 23-24.[7]

Pennsylvania and those jurisdictions that follow its reasoning purport to follow Terry; but in fact, they seriously distort the rationale of that case. These jurisdictions clearly recognize that a report of a man with a gun warrants investigation, but they decline to allow police to act in a way that would reasonably allow investigation to occur. The police are told that they may investigate, but only in a way that risks their lives and the lives of those around them. Their other supposed choice -- to passively watch the suspect and hope that he does something overtly incriminating -- is simply an abdication of investigation, and does not reduce the risk. The

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[7] Also worthy of note is the analysis of the Maryland Court of Special Appeals in addressing a challenge to a Terry stop and frisk:

> In balancing the interests that are involved when a close call must be made by an officer on the street, we cannot forget that an error on one side of the line may result in an inconvenienced and offended citizen, a circumstance not to be lightly dismissed. An error on the other side of the line, however, may result in a dead policeman.

State v. Blackman, 94 Md.App. 284, 617 A.2d 619, 628 (1992).

only rational choice under these cases, it seems, is for the police to stay safely indoors. Abandoning the public to its fate is viewed by such courts as the proper application of Terry.

Under Terry as understood by the Pennsylvania Supreme Court, a report of a man entering a school with a gun is not a cause for "histrionic" concern. The police should assume the gunman is planning to teach firearms safety. Investigating would be "more likely to endanger than to protect the public." J.L., 727 So.2d at 209; Hawkins, 692 A.2d at 1071.

Jurisdictions that follow the Pennsylvania view of Terry are systematically misapplying the Fourth Amendment, in a way that places literally thousands of people unnecessarily at risk from gun violence. In the midst of a national crisis in which ways are sought to control illegal handguns, the one thing that is not needed is an idiosyncratic interpretation of Terry that bars reasonable police investigation of "man with a gun" calls. Because this Court's pending decision in Florida v. J.L. will resolve the existing split among jurisdictions considering this issue, certiorari should be granted in this case in order to ensure uniformity in the application of the Fourth Amendment in cases where police make a Terry stop in response to a "man with a gun" call.

II. THE PENNSYLVANIA SUPREME COURT'S HOLDING THAT FLIGHT IS IRRELEVANT IN DETERMINING REASONABLE SUSPICION UNDER TERRY IS IN DIRECT CONFLICT WITH THIS COURT'S RECENT DECISION IN ILLINOIS V. WARDLOW.

Even if this Court were to decide in J.L. that an anonymous "man with a gun" call, standing alone, is insufficient to justify a Terry stop, the Pennsylvania Supreme Court's decision in this case cannot withstand Fourth Amendment scrutiny. In light of this Court's recent decision in Illinois v. Wardlow, No. 98-1036, 2000 U.S. LEXIS 504 (2000), it is crystal clear that respondent's unprovoked flight from police, viewed in combination with the "man with a gun" call, unquestionably provided reasonable suspicion for the stop of respondent. The Pennsylvania Supreme Court's determination that respondent's flight was irrelevant under Terry cannot survive Fourth Amendment scrutiny, and is directly contrary to this Court's holding in Wardlow. At a minimum, this case should be remanded to the Pennsylvania Supreme Court for reconsideration in light of Wardlow.

In rejecting respondent's flight as irrelevant under Terry, the Pennsylvania Supreme Court concluded that flight can only be considered in the reasonable suspicion context if police observe overtly suspicious conduct on the part of the suspect before he or she flees. Thus, the Court concluded that it didn't matter that police had a report of a man with a gun at a specific location, and that respondent matched the description of the reported gunman. Rather, because respondent merely ran away when police arrived, without first doing something suspicious like shooting the officer or an innocent bystander, the police were required to do nothing

because, in the view of the Pennsylvania Supreme Court, "[i]n the absence of any factors indicating that the officer suspected criminal activity was afoot, the `additional' factor of flight is not relevant to the determination of reasonable suspicion." In the Interest of D.M., 743 A.2d at 426.

This reasoning is ridiculous. The officer in this case did suspect criminal activity was afoot, and his suspicion was clearly reasonable under the circumstances. The officer was responding to a call reporting a man with a gun. Respondent was at the location identified by the report, and matched the description of the alleged gunman. When the officer arrived on the scene, respondent reacted by running away when the officer attempted to communicate with him. The Pennsylvania Supreme Court, however, apparently concluded that the flight was not itself suspicious because it was not preceded by other suspicious conduct which was observed "firsthand" by the officer. Id. Thus, according to the Pennsylvania Supreme Court's tortured logic, flight is only suspicious when it is preceded by other suspicious conduct.

Like its analysis of the reasonableness of police responding to a "man with a gun" call, the Pennsylvania Supreme Court's analysis of the significance of flight under Terry is -- not surprisingly -- at odds with the vast majority of courts. Most jurisdictions have recognized the often crucial weight a suspect's flight can provide in the reasonable suspicion analysis.[8]

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[8] See Tom v. Voida, 963 F.2d 952, 958 (7th Cir. 1992) ("flight is certainly a relevant and probative factor" supporting a finding of reasonable suspicion); United States v. Pope, 561 F.2d 663, 668 (6th Cir. 1977)("Flight invites pursuit and colors conduct which hitherto has appeared innocent."); United States v. Bowles,

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625 F.2d 526, 535 (5th Cir. 1980)("in appropriate circumstances [flight] can supply the `key ingredient justifying the decision of a law enforcement officer to take action'"); United States v. Brown, 159 F.3d 147, 149 (3d Cir. 1998), cert. denied, 119 S. Ct. 1127 (1999)("We have held that flight combined with other factors may support a warrantless stop and frisk."); United States ex rel. Richardson v. Rundle, 461 F.2d 860, 864 (3d Cir. 1972), cert. denied, 410 U.S. 911 (1973)(flight and furtive actions at approach of police are strong indicia of mens rea and constitute significant factors in decision to make Terry stop); United States v. Harley, 682 F.2d 398, 401 (2d Cir. 1992)(flight "surely may be considered as meaningful by police officers contemplating ... a stop or an arrest"); Dimascio v. Anchorage, 813 P.2d 696, 699 (Alaska App. 1991)("an unprovoked act of flight is a legitimate factor which the police and the courts can take into account when determining reasonable suspicion for a stop"); People v. Souza, 9 Cal. 4th 224, 36 Cal.Rptr.2d 569, 885 P.2d 982, 988 (1994)("flight from police is a proper consideration -- and indeed can be a key factor -- in determining whether in a particular case the police have sufficient cause to detain"); Platt v. State, 589 N.E.2d 222, 226 (Ind. 1992) ("Flight at the sight of police is undeniably suspicious behavior."); State v. Belton, 441 So. 2d 1195, 1198 (La. 1983), cert. denied, 466 U.S. 953 (1984) (flight "may be highly suspicious and, therefore, may be one of the factors leading to a finding of reasonable cause"); City of St. Paul v. Vaughn, 306 Minn. 337, 237 N.W.2d 365, 369 (1975)(recognizing "that flight from police officers will serve to furnish the basis of an investigative stop"); State v. Sweet, 44 Wash. App. 226, 721 P.2d 560, 563 (1986), appeal denied, 107 Wash. 2d 1001 (1986)("Courts have generally regarded flight in the presence of police officers to be a circumstance that may be considered along with other factors in determining whether an investigatory stop is justified."); State v. Anderson, 155 Wis. 2d 77, 454 N.W.2d 763, 768 (1990)("`it would defy common sense' to conclude that fleeing from the police does not amount to suspi-

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Indeed, just sixteen days after the Pennsylvania Supreme Court decided this case, this Court decided Illinois v. Wardlow, supra. In Wardlow, police were traveling in a four-car caravan through an area of Chicago known for heavy narcotics traffic in order to investigate drug transactions. When they passed by the street on which Wardlow was standing, he looked at the police and ran away through an alley. One officer saw this and pursued Wardlow, stopped him, and conducted a frisk for weapons, which resulted in the

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cious circumstances affording reasonable grounds to justify at least a demand for identification and an inquiry into the sudden flight"). See also Michigan v. Chesternut, 486 U.S. 567, 576 (1988)(Kennedy, J., Concurring)("respondent's unprovoked flight gave the police ample cause to stop him"); United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975)(behavior such as erratic driving or obvious attempts to evade officers can support a reasonable suspicion to stop a car near the border); Sibron v. New York, 392 U.S. 40, 66 (1968)(flight at approach of police is "strong indicia of mens rea").Accord United States v. Garcia, 516 F.2d 318, 320 (9th Cir. 1975), cert. denied, 423 U.S. 934 (1975); United States v. Johnson, 741 F.2d 223, 224 (8th Cir. 1984); United States v. Wilson, 2 F.3d 226, 231 (7th Cir. 1993), cert. denied, 511 U.S. 1054 (1994); United States v. Lane, 909 F.2d 895, 899 (6th Cir. 1990), cert. denied, 498 U.S. 1093 (1991); United States v. Silva, 957 F.2d 157, 160 (5th Cir. 1992), cert. denied, 506 U.S. 887 (1992); United States v. Haye, 825 F.2d 32, 34 (4th Cir. 1987); United States v. Embry, 546 F.2d 552, 555 (3d Cir. 1976), cert. denied, 430 U.S. 948 (1977); United States v. Bennett, 514 A.2d 414, 416 (D.C. App. 1985); Hovington v. State, 616 A.2d 829, 832 (Del. 1992); State v. Stinnett, 104 Nev. 398, 760 P.2d 124, 126-127 (1988); People v. Martinez, 80 N.Y.2d 444, 591 N.Y.S.2d 823, 606 N.E.2d 951, 953 (1992); State v. Butler, 331 N.C. 227, 415 S.E.2d 719, 722-723 (1992).

seizure of an illegal handgun. The Illinois Supreme Court, employing reasoning similar to the Pennsylvania Supreme Court in this case, held that flight from a police officer is insufficient to justify an investigatory stop unless there are other "specific facts corroborating the inference of guilt gleaned from defendant's flight." People v. Wardlow, 183 Ill. 2d 306, 316, 701 N.E.2d 484, 489, 233 Ill. Dec. 634 (1998), reversed, No. 98-1036, 2000 U.S. LEXIS 504 (2000). This Court granted certiorari and reversed the decision of the Illinois Supreme Court.

While this Court deemed Wardlow's mere presence in a high crime area as insufficient to justify a Terry stop, it concluded that, when viewed in combination with his unprovoked flight from police, reasonable suspicion was established to justify the stop. With respect to the significance of Wardlow's flight, this Court observed:

> Our cases have ... recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight -- wherever it occurs -- is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.

Illinois v. Wardlow, 2000 U.S. LEXIS 504, *10. This reasoning is simply incompatible with the Pennsylvania Supreme Court's Fourth Amendment analysis in this case. Wardlow makes clear that flight itself is suspicious conduct, and standing alone is relevant to determining the existence of reasonable suspicion under Terry.

Indeed, in Wardlow, the police were not even investigating any particular person, nor did they have any specific information of wrongdoing; they were just looking for drug transactions in an area known for such activity. In this case, by contrast, police had information that a particularly described person had a gun at a specific location, and respondent matched that description and was at that precise location within four seconds after the tip was relayed to the officer. Thus, although respondent was not displaying a gun when police arrived, his unprovoked flight, like that of Wardlow's, was certainly suggestive of wrongdoing and further served to corroborate the information provided by the anonymous "man with a gun" call. In light of this Court's holding that there was reasonable suspicion to stop Wardlow because he was present in a high crime area and ran when he saw police, the Pennsylvania Supreme Court's rationale in this case cannot withstand scrutiny under the Fourth Amendment. For this reason as well, this Court should grant certiorari in this case and, at a minimum, remand the case for reconsideration in light of Wardlow.

CONCLUSION

Wherefore, the Commonwealth of Pennsylvania respectfully requests this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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[J-24-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN THE INTEREST OF D.M.,	: No. 21 E.D. Appeal Docket 1998
	: Order of the Superior Court dated November 19, 1997, at No. 3538 Philadelphia 1996 affirming the Order of the Court of Common Pleas
APPEAL OF: D.M.	: of Philadelphia County dated October 2, 1996, at Juvenile Petition No. 4074-96-06
	: ARGUED: February 3, 1999

OPINION

MR. JUSTICE CAPPY
DECIDED: December 27, 1999

The sole issue presented in the instant appeal is whether the police officer demonstrated the requisite cause to stop appellant pursuant to the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution. For the reasons stated herein, we determine that the officer did not possess the requisite cause to stop appellant, and accordingly, reverse the court below.

As the issue before us arises from the ruling of the suppression court, our standard of review is limited. When reviewing rulings of a suppression court, we must determine

whether the record supports that court's findings of fact. *Commonwealth v. Cortez*, 507 Pa. 529, 491 A.2d 111 (1985). Where the defendant has appealed, we consider the evidence presented by the prosecution and only that evidence from the defense that is uncontradicted. *Id.* Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts. *Id.*

The facts, presented at the suppression hearing, established the following. On June 24, 1996, at approximately 6:00 p.m., Officer Chris Frazier received a radio call regarding a man with a gun at 28th and Cecil B. Moore Avenues in Philadelphia. The officer was only one block from the location at the time of the call. The radio call included a description of the "man with a gun" as a black male, wearing a white t-shirt, blue jeans and white sneakers.

Upon arriving at the scene, the officer saw appellant, D.M., who matched the description given by the radio call.[1] Officer Frazier exited his vehicle and told appellant to come over. Appellant ran away from the officer. Police back up approached the scene and appellant was stopped between the two cars. Officer Frazier asked appellant to put his hands on the hood of the car in front of him and proceeded to pat appellant down for the officer's own protection. Officer Frazier felt a hard object resembling a handgun in appellant's crotch area. A .32 caliber handgun fell out of appellant's

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[1] Although there appears to be some dispute as to whether appellant was the only person present at the time Officer Frazier arrived on the scene, our scope of review is limited to considering only the evidence that is uncontradicted.

right pants leg. At that point, Officer Frazier secured the gun and arrested appellant.

Appellant filed a motion to suppress alleging violations of both the United States and Pennsylvania Constitutions. Following a hearing, the trial court denied appellant's motion to suppress. That same day, the court adjudicated appellant delinquent and placed him on Intensive Probation. The Superior Court affirmed in a memorandum opinion. This court granted the petition for allowance of appeal in order to address the issue of whether the officer possessed reasonable suspicion to stop appellant based on an anonymous tip, where appellant fled at the time he was approached by the officer.[2]

Appellant argues that the officer did not establish reasonable suspicion based upon Article 1, Section 8 of the Pennsylvania Constitution. Specifically, appellant asserts that anonymous tips that lack specificity carry no indicia of reliability, and therefore cannot be used in establishing reasonable suspicion. The Commonwealth responds that the anonymous tip was sufficiently specific in the description and location of appellant. Thus, when examined in their totality, the facts in the instant case, including the tip and appellant's subsequent flight, demonstrate reasonable suspicion.

Both the Fourth Amendment of the United States Constitution and Article 1, §8 of the Pennsylvania

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[2] Appellant did not contend that the frisk was improper in the courts below. Similarly, appellant does not contend that the frisk was improper to this court, thus the only issue we address is whether the stop was supported by reasonable suspicion.

Constitution protect citizens from unreasonable searches and seizures. *Commonwealth v. Jackson*, 698 A.2d 571, 573 (Pa. 1997). In the seminal case on reasonable suspicion, the United States Supreme Court determined that in order to stop a defendant the officer must demonstrate that he had a reasonable suspicion that criminal activity was afoot. *Terry v. Ohio*, 392 U.S. 1 (1968). "[T]he police officer must be able to point to specific and articulable facts and reasonable inferences drawn from those facts in light of the officer's experience." *Commonwealth v. Cook*, 735 A.2d 673, 677 (Pa. 1999); *Jackson*, 698 A.2d at 573; *Terry*, 392 U.S. at 27. In determining whether reasonable suspicion exists for a *Terry* stop, the inquiry is the same under either Article 1, Section 8 of the Pennsylvania Constitution or the Fourth Amendment of the United States Constitution. *Cook*, 735 A.2d at 675; *Jackson*, 698 A.2d at 573.

In *Jackson*, this court recently considered almost identical facts to those involved in the instant case, and concluded that the officers did not possess reasonable suspicion to justify a stop of appellant. *Jackson*, 698 A.2d at 573. However, the Commonwealth insists that the anonymous tip in the instant case was more specific than the tip in *Jackson*.

In *Jackson*, the police officer received a radio report of a man in a green jacket with a gun. The officer was also provided with a location. The officer responded to the report and upon arriving at the specified location, saw a group of people in which appellant was the only person wearing a green jacket. The officer exited his vehicle and immediately searched appellant.

In rejecting the Commonwealth's contention that the officer possessed a reasonable suspicion that criminal activity was afoot, this court explained that anonymous tips should be

treated with particular suspicion. *Jackson*, 698 A.2d at 573. In order to be considered reliable the anonymous tip must supply specific facts, which are sufficiently corroborated by the officer. *Jackson*, 698 A.2d at 574. Facts that may be utilized in determining reasonable suspicion should indicate a particularized knowledge, and should not be those facts available to the general public. *Jackson*; *see also Alabama v. White*, 496 U.S. 325 (1990) (facts which predict a defendant's future behavior make anonymous tip more reliable). "The fact that a suspect resembles the anonymous caller's description does not corroborate allegations of criminal conduct, for anyone can describe a person who is standing in a particular location at the time of the anonymous call. Something more is needed to corroborate the caller's allegation of criminal conduct." Jackson, 698 A.2d at 574-5; *quoting Hawkins*, 692 A.2d at 1070. Based upon the above, the court concluded that the mere physical description and location of appellant were insufficient to satisfy the reasonable suspicion requirement. *Jackson*, 698 A.2d at 575.

We are not persuaded by any attempts to distinguish the radio report in the instant case from the one in *Jackson*. We do not see how the "additional" facts of the race of the appellant and a full clothing description of the appellant imparted more reliability to the instant tip. Akin to the tip in *Jackson*, there is nothing in this tip to indicate that the person providing the tip had any particularized knowledge about appellant. As we stressed in *Jackson*, anyone can describe a person who is standing in a particular location at the time of the anonymous call. In that instance, the tip must provide something more. Here, the tip provided nothing more than a physical description and location of the appellant, the equivalent to the tip in *Jackson*. Officer Frazier did not testify that appellant was acting suspiciously at the time he arrived on the scene. He also did not make any observations that would

insinuate that criminal activity was afoot. In fact, the evidence merely suggests that appellant was "hanging out" when Officer Frazier reached the scene. Accordingly, there was nothing in the instant anonymous tip or the circumstances surrounding the tip that provided the officers with a reasonable suspicion that criminal activity was afoot.[3]

However, our inquiry does not end here, because the Commonwealth asserts that appellant's subsequent flight furnished the police officers with a reasonable suspicion to stop appellant. In *Commonwealth v. Cook*, *supra*, this court recently explained the relevance of an appellant's subsequent flight in determining reasonable suspicion. Although ultimately, in *Cook*, this court did not suppress the contraband, the analysis regarding flight is instructive for purposes of the instant case.

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[3] The dissent asserts that the corroboration requirements should be lessened where the suspect is alleged to be carrying a gun, given the risk that a suspected gun carrier poses to the police and in turn, society. Dissenting opinion at 3. Contrary to the insinuations of the dissenting opinion, we are mindful of the risks that police officers in this Commonwealth face on a daily, even hourly, basis. We are also cognizant of the widespread public violence that has erupted in our schools and streets, due in part to the accessibility to firearms. However, this Court has steadfastly refused the temptation to step onto the slippery slope by recognizing a "gun exception" to the limitations placed upon search and seizures by both the Fourth Amendment and Article 1, §8; and we continue to decline any invitations to recognize such an exception today. *Jackson*, 698 A.2d at 575 (*quoting Hawkins*, 692 A.2d at 1070 (". . . there is no gun exception to the *Terry* requirement for reasonably suspicion of criminal activity. . . .")).

In *Cook*, this Court made clear that flight alone does not establish reasonable suspicion. 735 A.2d at 677. However, flight along with other facts, may demonstrate a reasonable suspicion that criminal activity is afoot. *Id.* In making the determination that reasonable suspicion existed, we relied upon the fact that the officer made firsthand observations of suspicious conduct, which based upon his experience, indicated that criminal activity was afoot, before he even approached appellant. *Id.* Moreover, we explained that flight could be considered in establishing reasonable suspicion, since the officer's suspicions were already aroused at the time appellant fled. *Id.* at 677-78. Accordingly, *Cook* makes clear that the appellant's subsequent flight becomes a relevant factor, in determining reasonable suspicion, only when the officer's suspicions are already aroused.

In the instant case, the officer's suspicions were not aroused at the time he initially approached appellant. As indicated previously, the tip and existing circumstances when Officer Frazier arrived at the scene failed to provide any facts that would lead an officer to reasonably suspect that criminal activity was afoot. In the absence of any factors indicating that the officer suspected criminal activity was afoot, the "additional" factor of flight is not relevant to the determination of reasonable suspicion.

Accordingly, for the reasons stated herein, we reverse the Superior Court and grant appellant's motion to suppress the contraband.

Mr. Justice Castille files a dissenting opinion joined by Madame Justice Newman.

Mr. Justice Saylor files a dissenting opinion.

Judgment entered
Dated: December 27, 1999

/s/
John W. Person, Esquire
Deputy Prothonotary

[J-24-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

	: No. 21 E.D. Appeal Docket
	: 1998
	:
IN THE INTEREST	: Order of the Superior Court
OF D.M.,	: dated November 19, 1997,
	: at No. 3538 Philadelphia
	: 1996 affirming the Order of
	: the Court of Common Pleas
	: of Philadelphia County
	: dated October 2, 1996, at
	: Juvenile Petition No.
APPEAL OF: D.M.,	: 4074-96-06
	:
	: ARGUED: February 3, 1999

DISSENTING OPINION

MR. JUSTICE CASTILLE
DECIDED: December 27, 1999

For the reasons expressed in Madame Justice Newman's Dissenting Opinions in *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068 (1997), and *Commonwealth v. Kue*, 547 Pa. 668, 692 A.2d 1076 (1997), I believe that the police officer in the instant matter was justified in initiating an investigative stop of appellant. Consequently, I would affirm the Superior Court's determination that the investigative stop herein satisfies the requirements of the United States and Pennsylvania Constitutions.

The majority correctly acknowledges that the standard for determining whether reasonable suspicion exists for a protective frisk is the same under both Article 1, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution. *Commonwealth v. Cook*, ___ Pa. ___, 735 A.2d 673 (1999); *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997). Nevertheless, the majority's interpretation of the corroboration requirements for an anonymous tip of a "suspect with a gun" continues to diverge from the interpretation of federal courts. *See, e.g., United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996) (anonymous tip that armed man dressed in tan shorts and shirt at certain location and "ambiguous gesture" justified frisking suspect); *United States v. Gibson*, 64 F.3d 617 (11th Cir. 1995), *cert. denied*, 517 U.S. 1173 (1996) (anonymous tip of armed man wearing long black trench coat at specific location and suspect reaching behind him justified frisking suspect); *United States v. Bold*, 19 F.3d 99 (2d Cir. 1994) (anonymous tip of armed man in gray Cadillac at specific location justified frisking suspect); *United States v. Clipper*, 973 F.2d 944 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1070 (1993) (anonymous tip that armed man wearing green and blue jacket and black hat at a specific location justified frisking suspect); *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981) (anonymous tip of armed man in black hat holding briefcase at specific location justified frisking suspect).

The majority asserts that *Alabama v. White*, 496 U.S. 325 (1990), always requires predictive information to support a finding of reasonable suspicion based on an anonymous tip. To the contrary, *Alabama v. White*, did not create a "categorical rule conditioning a Terry stop . . . on the corroboration of predictive information." *Clipper*, *supra* at 949. In *United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996), in which there

was an anonymous tip of a man selling narcotics, the United States Court of Appeals for the Third Circuit noted *in dicta* that predictive information may not be required to conduct a protective frisk based on an anonymous tip of a "suspect with gun." The Third Circuit cited *Clipper*, *supra*, for the proposition that the police have the requisite reasonable suspicion to conduct a protective frisk when an anonymous tip involves: (1) the report of a suspect with a gun, (2) a description of the suspect, and (3) the suspect's location. The court in *Clipper* reasoned that:

> [The] element of imminent danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in 'controlled buys.' Where guns are involved, however, there is the risk that an attempt to 'wait out' the suspect might have fatal consequences.

Clipper, *supra* at 951.

The simple rationale for the *Clipper* standard is to provide police with the tools to decrease the deadly risk when confronting suspects who may be armed with firearms. A protective risk "allow[s] the officer to pursue his investigation without fear of violence . . . ." *Adams v. Williams*, 407 U.S. 143, 146 (1972). A police officer is "required to act swiftly to apprehend an individual reported to be in possession of a gun . . . and [is] a potential threat to the safety of the officer and other persons in the area." *Commonwealth v. Lagana*, 517 Pa. 371, 377, 537 A.2d 1351, 1354 (1988). This Court should properly balance the privacy interests of a citizen of this Commonwealth with the risk encountered by

police officers entrusted with the protection of society and their own personal safety. A proper balance is found when this Court acknowledges that an anonymous tip concerning a suspect with a gun requires less corroboration given the risk of a police encounter with a potentially armed suspect.

Therefore, I believe that the facts of the instant matter under the standard set forth in *Clipper* support a finding that the officer had reasonable suspicion to conduct a protective frisk for weapons. The majority's holding here greatly enhances the possible infliction of death or serious injury to those in whom society chooses to enforce the public safety, the police, and concomitantly increases the danger to all members of society by greatly decreasing the ability of the police to remove illegally carried firearms from our public streets.

Madame Justice Newman joins this dissenting opinion.

[J-24-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN THE INTEREST OF D.M.	: No. 21 E.D. Appeal Docket : 1998
	: Appeal from Judgment of : Superior Court entered on : November 19, 1997 at No. : 3538 PHL 1996 affirming the : Order entered on October 2, : 1996 in the Court of : Common Pleas, Philadelphia : County, Family Division at : No. 04074-96-06
APPEAL OF: D.M.	: ARGUED: February 3, 1999

DISSENTING OPINION

MR. JUSTICE SAYLOR
DECIDED: December 27, 1999

As the majority notes, this Court's precedent establishes that an anonymous report of an armed individual on a public street is not, in and of itself, sufficient to support an investigatory detention/protective frisk, *Commonwealth v. Jackson*, 548 Pa. 484, 493, 698 A.2d 571, 575 (1997), nor is an individual's flight from an approaching police officer alone sufficient for such purpose. *See Commonwealth v. DeWitt*, 530 Pa. 299, 308, 608 A.2d 1030, 1034 (1992). While the United States Supreme Court has granted

certiorari in cases implicating both of these holdings,[1] at this juncture I therefore agree, in the present case, that neither the informer's tip nor D.M.'s flight independently constitutes a sufficient justification for the investigatory detention of D.M.

I differ with the majority, however, in the assessment of the totality of the circumstances presented. *See generally United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981) (stating that "the essence [of the determination of reasonable suspicion] . . . is that the totality of the circumstances -- the whole picture -- must be taken into account"); *In re D.M.*, 556 Pa. 160, 168, 727 A.2d 556, 559-60 (1999) (same). Here, in addition to identifying potentially dangerous behavior, the anonymous informer provided descriptive information about the subject in terms of race, attire and venue. Such information was corroborated by police observation upon immediate arrival at the designated location.[2] As the uniformed officer approached,

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[1] *See Florida v. J.L.*, ___ U.S. ___, 120 S. Ct. 395 (1999) (granting *certiorari* to review *J.L. v. State*, 727 So.2d 204 (Fla. 1998), in which the Florida Supreme Court held that an anonymous tip providing only a description and location of a person possessing a firearm is insufficient to warrant an investigative detention); *Illinois v. Wardlow*, ___ U.S. ___, 119 S. Ct. 1573 (1999) (granting *certiorari* to review *People v. Wardlow*, 701 N.E.2d 484, 486 (Ill. 1998), in which the Illinois Supreme Court held that a defendant's flight upon the approach of a police vehicle patrolling a high crime area, alone, was insufficient to justify an investigatory stop).

[2] Since the tip lacked predictive information, it was not, by itself, adequate to justify an investigative detention. *See Alabama v. White*, 496 U.S. 325, 332, 110 S. Ct. 2412, 2417 (1990). I do

(Continued)

D.M. fled to avoid the encounter. Thus, at this point, I believe that the circumstances had ripened into an objectively reasonable basis for suspicion.

The majority asserts that, as D.M. was approached, the officer's suspicions were not aroused, and therefore, D.M.'s subsequent flight merits no consideration in the totality of the circumstances. It is unclear to me, however, in what sense the majority employs the word "suspicion" in this analysis. I believe that, prior to D.M.'s departure, based upon the partially corroborated tip, the officer did in fact "suspect" (in the subjective, common sense usage of that word) that the juvenile with whom he was confronted might possess a weapon and therefore be engaged in a criminal act. It is for that reason that the officer approached D.M. in the first instance; indeed, the officer would have been remiss in his responsibilities if he had not conducted some further investigation.

The majority's analysis appears to contemplate some intermediate degree of suspicion -- between that which would prompt further, limited police investigation (for example, a mere encounter) and the objectively reasonable degree

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(Continued)

not read *Alabama v. White*, however, as foreclosing consideration of a non-predictive anonymous tip as a component of the totality of the circumstances in a case in which independent information (here, D.M.'s flight) is also present. *See generally United States v. Roberson*, 90 F.3d 75, 80 (3rd Cir. 1996) (noting that the omission of predictive information from an anonymous tip would not necessarily have invalidated it as a consideration in the totality of the circumstances, if, after corroborating readily observable facts, police had also observed unusual or suspicious conduct on the suspect's part).

necessary to justify an investigative detention -- which must be present before flight will take on any legal significance in the totality of the circumstances. In my view, however, this form of analysis departs from the fundamental inquiry, namely, whether "the facts available to the officer at the moment of the search and seizure 'warrant a man of reasonable caution in the belief' that the action taken was appropriate," *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968) (citations omitted), and creates the potential for confusion among police officers in the course of day-to-day encounters. Nor a I able to meaningfully distinguish the quantum of information that was available to the officers in *Commonwealth v. Cook*, ___ Pa. ___, 735 A.2d 673 (1999), a case in which the Court found that the defendant's flight from police did have significance in the totality of the circumstances, from that which was available here.[3]

Accordingly, I would hold that the circumstances present in this case formed an objectively reasonable basis for suspicion, thus justifying the investigatory detention.

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[3] I am also unable to meaningfully distinguish the decision in *Commonwealth v. Lagana*, 517 Pa. 371, 537 A.2d 1351 (1988), in which the Court concluded that a partially corroborated tip plus suspicious behavior in the form of the use of binoculars (giving rise to a suspicion that the defendant was "casing" a business establishment) formed a sufficient basis for objectively reasonable suspicion. In this regard, I note that the issue of binoculars in this situation, and D.M.'s flight in the present case, would seem equally to be activities that would generate suspicion on the part of an investigating officer, but at the same time would carry some possibility of legitimate explanation.

J.A39004/97

IN THE INTEREST OF: D.M.	:	**IN THE SUPERIOR COURT OF PENNSYLVANIA**
APPEAL OF: D.M.	:	No. 3538 Philadelphia 1996

ORDER

AND NOW, this 30th day of January, 1998, IT IS HEREBY ORDERED:

THAT the application filed December 1, 1997, requesting reargument/reconsideration of the decision dated November 19, 1997 is DENIED.

PER CURIAM

. A39004/97

IN THE INTEREST OF: D.M.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
	:	No. 03538 Philadelphia
APPEAL OF: D.M.	:	1996

Appeal from the Order entered October 2, 1996 In the Court of Common Pleas of Philadelphia County, Juvenile, No. 04074-96-06

BEFORE: JOHNSON, FORD ELLIOTT, MONTEMURO, JJ*

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ David A. Szewczak
PROTHONOTARY

Dated: November 19, 1997.

. A39004/97

IN THE INTEREST OF: D.M.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
	:	No. 03538 Philadelphia
APPEAL OF: D.M.	:	1996

Appeal from the Order entered October 2, 1996 In the Court of Common Pleas of Philadelphia County, Juvenile, No. 04074-96-06

BEFORE: JOHNSON, FORD ELLIOTT, MONTEMURO, JJ*

MEMORANDUM: FILED NOV 19 1997

This appeal arises from an order of adjudication and disposition following the court's finding Appellant, D.M., delinquent for violating various provisions of the Uniform Firearms Act.[1] We affirm.

Appellant contends that the trial court erred in denying his pretrial motion to suppress physical evidence which he alleges was seized in violation of both the United States and Pennsylvania Constitutions. Our standard in reviewing the denial of a suppression motion is well-established:

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[1] Specifically, Appellant was convicted of carrying a firearm without a license (18 Pa.C.S. § 6106), carrying a firearm on a public street (18 Pa.C.S. § 6108), and possession of a firearm by a minor (18 Pa.C.S. § 6110.1).

*Retired Justice assigned to Superior Court.

considering only the evidence of the Commonwealth, and so much of the evidence of the defendant that remains uncontradicted in the context of the record as a whole, we must determine whether the court's factual findings are supported by the record. *Commonwealth v. Martinez Jackson*, 451 Pa. Super. 129, 133, 678 A.2d 798, 800, *allocatur denied*, 685 A.2d 543 (1996). "If the evidence supports the findings of the trial court, we are bound by such findings and may reverse only if the legal conclusions drawn therefrom are erroneous." *Id.*

At the suppression hearing, Officer Christopher Frazier, of the Philadelphia Police Department, testified that he was in uniform on routine patrol on June 24, 1996 in the area of Cecil B. Moore Avenue and 29th Street. At approximately 6:00 p.m. he received a radio call, based on an anonymous tip, to investigate a male "possibly with a handgun" at 28th Street and Cecil M. Moore Avenue. (N.T. 10/2/96 at 5). The tipster described the suspect as "black male, white t-shirt, blue jeans and white sneakers." (*Id.* at 6). Since Officer Frazier was only one block away, he arrived at the location in approximately four seconds.

Officer Frazier testified that Appellant was the only male on the corner and the only one fitting the tipster's description.[2] He emerged from his vehicle and asked Appellant to "come here." (*Id.* at 9). Instead, Appellant fled and Officer Frazier pursued him. When the officer's backup arrived and began to chase Appellant from another direction, Appellant stopped between both of the officers. Officer

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[2] Although Appellant testified that there were at least eight other people near him at the time of the stop, some of whom were wearing a white t-shirt and jeans, we may only consider the evidence of Appellant that was **uncontradicted**.

Frazier asked him to place his hands on the vehicle in front of him and conducted a pat-down search for weapons "for officers' safety." (*Id.* at 7). He felt a hard object that he believed was a handgun in Appellant's crotch area. A silver .32 caliber handgun then fell out of Appellant's right pant leg. Appellant was arrested and charged with various violations of the Uniform Firearms Act.

Appellant filed a pretrial motion to suppress on September 16, 1996, alleging violations of both the United States and Pennsylvania Constitutions, and a hearing was held on October 2. Following the hearing, the trial judge denied Appellant's motion, and Appellant agreed to incorporate the testimony from the suppression hearing and to stipulate to a ballistics report for purposes of adjudication. That same day, the court adjudicated Appellant delinquent and placed him on Intensive Probation. This timely appeal follows.

Appellant argues that the suppression court erred for two reasons:

> (1) An unverified radio call from an unknown source, without any predictions of future behavior or other independent corroboration, can not establish reasonable suspicion; and
>
> (2) The information contained in the radio call was too general to support a finding of reasonable suspicion.

(Appellant's Brief at 3). We disagree, and for the reasons set forth below, affirm.

In the absence of probable cause to arrest, a police officer may stop and briefly detain an individual for

investigatory purposes when he can "point to specific and articulable facts which warrant the initial stop." *Commonwealth v. Espada*, 354 Pa. Super. 604, 607, 528 A.2d 968, 969 (1987) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). "This standard is met 'if the police officer observes unusual and suspicious conduct on the part of the individual which leads him reasonably to conclude that criminal activity may be afoot. . . .'" *Id.* (quoting *Commonwealth v. Hicks*, 434 Pa. 153, 158, 253 A.2d 276, 279 (1969)). Moreover, an officer may rely on information he receives over the police radio to justify the stop; he need not personally observe the suspicious conduct. *Commonwealth v. Arch*, 439 Pa. Super. 606, 612, 654 A.2d 1141, 1144 (1995). The factors an officer should consider when making a *Terry* stop not based on his personal observations include: "the specificity of the description of the suspect in conjunction with how well the suspect fits the given description, the proximity of the crime to the sighting of the suspect, the time and place of the confrontation, and the nature of the offense reported to have been committed." *Commonwealth v. Jerry Jackson*, 359 Pa. Super. 433, 438, 519 A.2d 427, 430 (1986); *accord M. Jackson, supra*. In our review, we must look to the totality of the circumstances "to determine whether a particularized and objective basis for suspecting an individual stopped of criminal activity exists." *Commonwealth v. Allen*, 452 Pa. Super. 200, 209, 681 A.2d 778, 783 (1996).

In the present case, the suppression court concluded that Officer Frazier had the requisite "reasonable suspicion" to stop Appellant based on the following facts: "[Appellant] exactly fit the description [of the suspect], [Appellant] was both spatially and temporally proximate to the scene, the crime was a felony and [Appellant] ran away when Officer Frazier told him to come over[.]" (Trial Ct. Op. at 4). We agree that these facts, considered in their totality, were

sufficient to provide the officer with the reasonable suspicion to conduct a *Terry* stop and frisk.[3]

Clearly, an anonymous tip, in and of itself, is insufficient to justify a *Terry* stop. *In Interest of D.W.*, 427 Pa. Super. 629, 633, 629 A.2d 1387, 1389 (1993). However, "[a] *Terry* stop may be made on the basis of an anonymous tip, provided the tip is sufficiently corroborated by independent police work to give rise to a reasonable belief that the tip was correct." *Commonwealth v. Carl Jackson*, No. 96-30, slip op. at 6 (E.D. Pa. filed July 23, 1997) (citing *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990)). When the officers have not personally observed the suspicious behavior, the specificity of the description of the suspect is "of great importance." *J. Jackson*, 359 Pa. Super. at 438, 519 A.2d at 430.

Moreover, a suspect's flight when approached by the police, in and of itself, cannot justify a Terry stop. *Commonwealth v. Jeffries*, 454 Pa. 320, 325, 311 A.2d 914, 917 (1973). *See also Commonwealth v. DeWitt*, 530 Pa. 299, 308-9, 608 A.2d 1030, 1034 (1992) ("We would be hard

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[3] Appellant does contend that the pat-down was improper; he argues only that the officer should not have "stopped" him in the first place. The police may frisk a suspect during an investigatory stop if they can "point to specific and articulable facts indicating that the person they intend to frisk may be armed and dangerous[.]" *J. Jackson*, 359 Pa. Super. at 439, 519 A.2d at 431. Here, the tipster indicated that Appellant was armed. Therefore, Officer Frazier was justified in conducting a limited pat-down for weapons. *See id.* at 439-40, 519 A.2d at 427 (stating that police may "reasonably believe themselves to be in danger when . . . a perpetrator is reported to possess or have used a weapon.") (citation omitted).

pressed to find that flight, in and of itself constitutes reasonable suspicion of criminal conduct"). However, flight, coupled with other factors, may be sufficient. *Commonwealth v. Mayo*, 344 Pa. Super. 336, 341, 496 A.2d 824, 826 (1984) (citation omitted). *See Commonwealth v. Moore*, 300 Pa. Super. 488, 446 A.2d 960 (1981) (finding reasonable suspicion to stop when officer observes appellant and companion emerging from alley at night in high crime area; they leaf through object and flee at sight of police); *Commonwealth v. Legg*, 258 Pa. Super. 294, 392 A.2d 801 (1978) (finding **probable cause to arrest** when officers receive anonymous tip that robbery suspect, described by victim as black male, 19-20 years old, five feet eleven inches, wearing blue and white shirt, is at particular address; when officers arrive, they see suspect, *clad only in underwear*, who matches description and suspect flees into home upon sight of police); *Commonwealth v. Stratton*, 231 Pa. Super. 91, 331 A.2d 741 (1974) (finding reasonable suspicion to stop when officer sees suspect after midnight outside door of closed laundromat twelve feet off sidewalk, and suspect flees upon observing officer).

In the present case, we are confronted with a suspect who **both** matches the physical description of a person alleged to be carrying a handgun **and** flees when approached by police. We conclude that these facts, viewed in their totality, rise to the level of reasonable suspicion necessary to initiate a *Terry* stop.

First, Appellant exactly matched the physical description of the suspect provided by the anonymous tipster; he was a black male dressed in a white t-shirt, blue jeans and white sneakers. In addition, Officer Frazier responded within four seconds of the call; therefore, Appellant was spatially and temporally where the tipster indicated he would be.

Moreover, the tipster stated that Appellant was carrying a handgun, which, if unlicensed, is a felony in Pennsylvania.[4] Finally, and most importantly, Appellant fled immediately after Officer Frazier asked him to "come here." Thus, we conclude that these facts, viewed in their totality, provided Officer Frazier with the reasonable suspicion to stop, briefly detain, and frisk Appellant. *See Commonwealth v. Ellis*, 541 Pa. 285, 662 A.2d 1043 (1995) (finding reasonable suspicion to stop appellant's vehicle when vehicle was only one on road near burglary scene, vehicle matched description of one at crime scene and vehicle was in area where it would have been if it left crime scene at time call was broadcast; despite fact that occupants, two black males, did not match description of suspects as two white or possibly "Mexican" males); *Commonwealth v. Whelton*, 319 Pa. Super. 42, 465 A.2d 1043 (1983) (finding reasonable suspicion to stop when appellant was observed at bus stop one block from reported purse snatching, 15 to 20 minutes after crime, and matched description of suspect). *Cf. C. Jackson*, *supra* (finding **no reasonable suspicion** to stop when police responded to report of man in green jacket carrying gun, and **immediately** searched appellant who matched description).

We find the facts of the present case very similar to those in *In Interest of S.J.*, 425 Pa. Super. 270, 624 A.2d 1068 (1993). In *S.J.*, an officer received a radio call that a "black female, wearing a red jacket, blue jeans, red sneakers

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[4] Appellant makes much of the fact that Officer Frazier testified that the radio call indicated that the suspect was "possibly" carrying a handgun. However, we find this irrelevant. Either the radio dispatcher or the officer, himself, could have added the word "possibly" simply because they did not know if the tip was reliable; certainly that is a reasonable inference to be drawn from the facts.

and curlers in her hair was selling narcotics on the 2300 block of West Turner." *Id.* at 272, 624 A.2d at 1069. The officer, admitting he did not know who placed the call or when it was received, responded within ten minutes and observed the appellant, who exactly matched the description of the suspect, standing with two men in front of 23 West Turner. *Id.* This Court concluded that "given the information received, the police, as part of good investigative procedures," were permitted to stop and briefly question her. *Id.* at 277, 624 A.2d at 1071. However, in that case, we then concluded that the officer's subsequent search of the appellant was unwarranted since he

> failed to observe any conduct corroborating the radio dispatch of criminal activity attributed to S.J., and when his questioning of S.J. did not disclose evidence (e.g., **furtive activity, evasive conduct** and/or erroneous information to his questions) indicative of criminal activity, the police had no reason to detain S.J. any longer nor search the inside of her jacket.

Id. at 27, 624 A.2d at 1071 (footnote omitted) (emphasis added). Conversely, in the present case, Appellant certainly displayed "furtive activity" and "evasive conduct" when he fled. This is exactly the situation we anticipated in *S.J.* would be sufficient to warrant a full *Terry* stop and frisk. *See S.J.*, 425 Pa. Super. at 279, 624 A.2d at 1072 ("Lastly, and most importantly, there were no furtive attempts at concealment, **no fleeing of the scene** and no other activity which would remove the Appellant's behavior from that of an ordinary citizen to that of a suspect criminal warranting a *Terry* 'frisk'.") (emphasis added).

Appellant's argument focuses solely on the anonymous tip. He dismisses the significance of his flight from the scene by stating that "[t]his Court has held specifically[, in *In the Interest of Barry W.*, 423 Pa. Super. 549, 621 A.2d 669 (1993), *aff'd sub nom. Commonwealth v. Biagini*, 540 Pa. 22, 655 A.2d 492 (1995),] that an anonymous tip bearing no indicia of reliability, and containing no predictions of future behavior, and unsupported by any corroborative observations by an officer, when coupled with flight, is not enough to justify a *Terry* stop." (Appellant's brief at 17-18). In doing so, however, Appellant has failed to consider the facts of that case.

In *Barry W.*, an officer received a radio call to investigate "'male selling narcotics' at a specific location." *Barry W.*, 423 Pa. Super. at 552, 621 A.2d at 671. When he arrived at the location, the officer observed two men, one of whom was the appellant, standing on the corner. *Id.* As he approached and said "stop police," the men fled. *Id.* The officer pursued the appellant and eventually arrested him. *Id.*

Clearly, *Barry W.* is distinguishable on its facts from the present case. Although both cases involved an anonymous tip and flight by the suspect, the tip in the present case was much more descriptive than that in *Barry W.* Indeed, in *Barry W.* the police could have suspected **any** male, standing near the location the tipster indicated, of selling drugs. "**There was no description of the alleged felon**, and the anonymous tip possessed no other indicia of reliability." *Id.* at 561, 621 A.2d at 675 (emphasis added). Here, however, the tipster described the suspect in greater detail: black male, white t-shirt, blue jeans and white sneakers. Moreover, Officer Frazier testified that Appellant was the only person at 28th Street and Cecil B. Moore Avenue fitting that description within four seconds of the radio call. Therefore, Officer

Frazier was able to form an **individualized** suspicion about Appellant even **before** he fled.[5]

Appellant also seems to assert that the Commonwealth should be required to prove a tipster's basis of knowledge at every suppression hearing based on a stop resulting from an anonymous tip. *See* Appellant's Brief at 15. However, that burden would virtually eliminate the use of **anonymous** tips.[6] Certainly, that is not what either the United States or Pennsylvania Supreme Courts have mandated. *See C. Jackson*, No. 96-30, slip op. at 5-6 (stating that although

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[5] Although Appellant claims that the tipster's description of the suspect was too general to support a finding of reasonable suspicion, we disagree. Indeed, in *S.J.*, *supra*, this Court found a very similar description sufficient to justify an investigatory stop.

Moreover, the case Appellant relies on for support, *Commonwealth v. Berrios*, 437 Pa. 338, 263 A.2d 342 (1970), is clearly distinguishable. In *Berrios*, the suspects in a shooting were described as "three males, two negroes in dark clothing and one Puerto Rican in light clothing." *Id.* at 341, 263 A.2d at 344. The appellant and his companion, matching the meager description of the suspects, were stopped twenty minutes after the radio call, three blocks from the scene of the crime. *Id.* Here, however, the tipster described not only the suspect's race and general color of clothing, but also the specific items of clothing the suspect was wearing. In addition, the officer observed Appellant within four seconds of the radio call at the exact location the tipster indicated he would be. Finally, Appellant fled when approached by the police. Therefore, the stop was not based solely on a general description, but instead on a more detailed description, as well as the suspect's actions when confronted by the police.

[6] It is difficult to comprehend how the Commonwealth could provide the testimony of a witness who is "anonymous."

anonymous tips "should be treated with particular suspicion[,] . . . [t]his does not mean that an officer may never conduct a *Terry* stop on the basis of an anonymous tip."). An anonymous tip, if sufficiently corroborated by an officer's own observations, can provide the basis for a *Terry* stop.[7]

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[7] Appellant relies on two recent decisions of the Pennsylvania Supreme Court, *Commonwealth v. Hawkins*, ___ Pa. ___, 692 A.2d 1068 (1997) and *Commonwealth v. Kue*, ___ Pa. ___, 692 A.2d 1076 (1997), to support his position that a Terry stop cannot be based on an anonymous tip. However, both of these cases are plurality decisions, without precedential authority. *Commonwealth v. Milligan*, ___ Pa. Super. ___, ___, 693 A.2d 1313, 1316 (1997).

Nevertheless, even if we were bound by these two decisions, we would distinguish them on their facts. In both *Hawkins* and *Kue*, the police received an anonymous tip that a person at a specific location was armed with a gun. In *Hawkins*, the tipster described the suspect as a black male wearing blue jeans, a blue cap, and a gold or brown coat. *Hawkins*, ___ Pa. at ___, 692 A.2d at 1069. The officer proceeded to the location, observed the appellant who matched the tipster's description and immediately stopped and frisked him. *Id.* In *Kue*, the tipster described the suspect as an Asian male wearing a striped shirt. *Kue*, ___ Pa. at ___, 692 A.2d at 1077. The officer arrived within three minutes of the call and saw four Asian males at the location, one of whom, not the appellant, was wearing a striped shirt. *Id.* When the officer arrived, he saw the men speak quickly to each other and look around. *Id.* The officer stopped and frisked all four men. *Id.*

In the present case, however, Appellant not only exactly matched the detailed physical description of the suspect, he also **fled** when approached by Officer Frazier. Therefore, we find this case sufficiently distinguishable from *Hawkins* and *Kue*.

Finally, Appellant argues that even if we find the stop and frisk permissible under Fourth Amendment standards, he is entitled to relief under Article I, Section 8 of the Pennsylvania Constitution. He contends that, under the Pennsylvania Constitution, it would be unacceptable "to hold that reasonable suspicion could be based upon information with no indicia of reliability." (Appellant's Brief at 21). Although we agree, we conclude that, in the present case, Appellant is not entitled to relief.[8]

The Pennsylvania Supreme Court has adopted the *Terry* standard for determining the reasonableness of a stop and frisk under Article I, Section 8. *C. Jackson*, No. 96-30, slip op. at 5 (citing *Commonwealth v. Melendez*, 544 Pa. 323, 676 A.2d 226 (1996)). A *Terry* stop and frisk is reasonable if it is "based on specific, articulable facts and reasonable inferences drawn from those facts in light of the officer's experience." *C. Jackson*, No. 96-30, slip op. at 5. Appellant contends that "[t]he pivotal question is whether Article I, Section 8 allows the police to act on sparse information *with no indicia of reliability*," (Appellant's Brief at 25). We agree that it does not. However, again, what Appellant fails to acknowledge is that Officer Frazier did not act **solely** on the basis of the anonymous tip. He proceeded to **investigate** the tip, and when he approached, Appellant fled. Thus, Officer Frazier stopped and frisked Appellant based on his corroboration of the anonymous tip, i.e., Appellant matched the physical description of the suspect, and was spatially and temporally proximate to the scene, **and** Appellant's flight.

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[8] Although the Commonwealth argues that this issue is waived, we find that Appellant challenged the stop under both the United States and Pennsylvania Constitutions at the suppression hearing.

We find this sufficient to satisfy the reasonable suspicion required for a stop and frisk under both the Fourth Amendment and Article I, Section 8.

Order affirmed.

THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
FAMILY COURT DECISION

IN THE INTEREST OF D.M.	: PETITION NO. 04074-96-06
	: APPEAL TO SUPERIOR
	: COURT NO. 3538 PHILA-
APPEAL OF: D.M.	: DELPHIA 1996

OPINION

JELIN, J. FILED: MARCH 19, 1997

Defendant was found guilty and adjudged delinquent by this Court on October 2, 1996 on the charges of Carrying a Firearm Without a License, Carrying a Firearm on Public Streets or Public Property in Philadelphia, and Possession of a Firearm by a Minor. Disposition was determined that same date and defendant was placed on Intensive Probation Services.

In his Statement of Matters Complained of on Appeal defendant contends "[t]he trial court erred as a matter of law by denying Appellant's Motion to Suppress Physical Evidence."

On June 24, 1996 at approximately 6:00 p.m. Officer Chris Frazier was on routine patrol when he received a radio call regarding a man with a gun at 28th and Cecil B. Moore Avenues, in Philadelphia. Officer Frazier was travelling east on C. B. Moore from 29th Street and only one block from the specified location. The radio call included a description of a black male, wearing a white T-shirt, blue jeans and white sneakers. (N.T., October 2, 1996, pgs. 4-6.)

Officer Frazier arrived at the location within four seconds and saw defendant fitting the description. He exited his vehicle and told the defendant to come over and defendant ran away. Officer Frazier's back up was approaching and defendant stopped between them. (N.T., pgs. 6-7.)

Officer Frazier asked defendant to place his hands on the car in front of him and patted him down for his own protection. He felt a hard object resembling a hand gun in defendant's crotch area. A .32 caliber handgun fell out of defendant's right pant leg. At that point Officer Frazier secured the gun and arrested the defendant. (N.T., pgs. 7-8.)

Defendant contends that an unverified radio call can not establish reasonable suspicion and the description contained in the radio call was too general to support a finding of reasonable suspicion.

It is well established that an "officer need not personally observe suspicious conduct leading to the reasonable belief needed for a *Terry* stop; rather, he may rely upon information received over the police radio to justify the stop." *Commonwealth v. Jackson*, 451 Pa. Super. 129, 678 A.2d 798 (1996) (citing *Commonwealth v. Arch*, 439 Pa. Super. 606, 654 A.2d 1141 (1995)). "Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability." *Commonwealth v. Jackson*, *supra*. (quoting *Commonwealth v. Knotts*, 444 Pa. Super. 60, 663 A.2d 216 (1995)). "The factors that must be considered in justifying an investigatory stop and subsequent frisk [when the suspicious conduct has not been personally observed by the officer] include the specificity of the description of the suspect in conjunction with how well the suspect fits the given description, the

proximity of the crime to the sighting of the suspect, the time and place of the confrontation and the nature of the offense reported to have been committed." *Commonwealth v. Jackson, supra.* (quoting *Commonwealth v. Jackson*, 359 Pa. Super. 433, 519 A.2d 427 (1986)).

In *Commonwealth v. Jackson, supra.* the officer received a radio call regarding a robbery in progress. The radio call included a description of an armed male wearing a black baseball hat and black jacket. Five minutes after receiving the call, the officer proceeded to the location and observed defendant wearing a dark colored baseball hat and black jacket two and a half blocks from the scene of the robbery. He stopped the defendant and asked where he had been. Defendant replied his girlfriend's house. The officer then frisked the defendant and recovered a .45 caliber gun. *Id.*

The Court found that the radio call supplemented with the other integral factors i.e., defendant exactly fit the description, defendant was both spatially and temporally proximate to the scene, the crime was a serious felony and it was late in the evening in a particularly dangerous area; created the requisite "specific and articulable facts" that warranted the stop of defendant. *Id.*

In the instant case Officer Frazier received a radio call regarding a man with a gun. The radio call included a description of a black male, wearing a white T-shirt, blue jeans and white sneakers. Officer Frazier arrived at the location within four seconds and observed defendant wearing a white T-shirt, blue jeans and white sneakers. He told defendant to come over and defendant ran away.

This Court found that the radio call supplemented with other integral factors ie, defendant exactly fit the description, defendant was both spatially and temporally proximate to the scene, the crime was a felony and defendant ran away when Officer Frazier told him to come over; created the requisite "specific and articulable facts" that warranted the stop of defendant.

In addition, Officer Frazier was authorized to frisk the defendant during the stop because the radio call specified a man with a gun. "[T]he right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence." *Commonwealth v. Prengle*, 293 Pa. Super. 64, 437 A.2d 992 (1981) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

For all of the above reasons the Motion to Suppress Physical Evidence was properly denied and the adjudication and disposition are appropriate.

/s/ Sheldon C. Jelin
J.

DATED: March 19, 1997

(2)

No. 99-1583

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

D.M.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Was the Opinion of the Pennsylvania Supreme Court in *In re D.M.* based on a bona fide separate, adequate and independent state ground, namely, Article I, § 8 of the Pennsylvania Constitution, so that the United States Supreme Court should not undertake to review that Opinion?

B. Did the Pennsylvania Supreme Court properly hold that the police violated Respondent's rights under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment by initiating an investigatory stop based on an anonymous tip of a man "**possibly** with a gun"?

C. Did the Pennsylvania Supreme Court properly hold that, under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment, flight added no legal justification to the police investigation of a suspect where the officers acted on the basis of an anonymous tip of a man "**possibly** with a gun" and the flight occurred only after the police had initiated a seizure?

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C. The Pennsylvania Supreme Court properly held that, under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment, flight added no legal justification to the police investigation of a suspect where the officers acted on the basis of an anonymous tip of a man "**possibly** with a gun" and the flight occurred only after the police had initiated a seizure 10

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OPINIONS BELOW

The decision of the Pennsylvania Supreme Court, published at *In re D.M.*, ___ Pa. ___, 743 A.2d 422 (1999), appears on Appendix 1-16 of the Petition for Writ of Certiorari. The unpublished Opinions of the Superior and trial courts appear as Appendices 18-31 and 32-35, respectively, of the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 8 of the Pennsylvania Constitution states as follows:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to be the affiant.

STATEMENT OF THE CASE

On June 24, 1996, at approximately 6 p.m., a Philadelphia police officer on routine patrol received a radio call to investigate a male "possibly with a handgun." The male was described as a black male wearing a white t-shirt, blue jeans, white sneakers. Within seconds, the officer arrived at the indicated location and saw Respondent, the only male on that corner, wearing a white shirt and blue jeans.

When the uniformed officer got out of his car, he told Respondent to "come here." At that, Respondent ran and the officer chased him. Another officer joined the pursuit, and Respondent stopped between the two officers. One officer told Respondent to put his hands up in the air and place them on the police car directly in front of him. The officer frisked Respondent for the officers' safety and felt a handgun in his crotch. Respondent was arrested and charged with violating Pennsylvania's Uniform Firearms Act.

On October 2, 1996, the trial judge denied a motion to suppress the gun, found Respondent guilty and delinquent, and placed him on intensive probation. Respondent filed an appeal in the Pennsylvania Superior Court, challenging the denial of the motion to suppress as contrary to Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution. On November 19, 1997, in a memorandum opinion, that Court affirmed. Respondent filed an Application for Reargument *En Banc* or, in the Alternative, Reconsideration, which the Superior Court, in a *per curiam* order, denied on January 30, 1998. On February 9, 1998,

Respondent filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. On July 8, 1998, the Pennsylvania Supreme Court granted the Petition for Allowance of Appeal, limited to the issue of "whether reasonable suspicion existed to conduct a lawful stop pursuant to the Fourth Amendment of the United States Constitution and Article I, § 8 of the Pennsylvania State Constitution." On December 27, 1999, the Pennsylvania Supreme Court reversed Respondent's adjudication, finding that the search and seizure had violated Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution.

On March 27, 2000, the District Attorney of Philadelphia County, Pennsylvania filed a Petition for Writ of Certiorari from the December 27, 1999, decision of the Pennsylvania Supreme Court in *In re D.M.*, ___ Pa. ___, 743 A.2d 422 (1999), citing to 28 U.S.C. § 1257(a). The petition was docketed on March 27, 2000. Respondent's Brief in Opposition is filed within thirty days of March 27, 2000, pursuant to Supreme Court Rule 15.3.

REASONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

A. Because the Opinion of the Pennsylvania Supreme Court in *In re D.M.* is based on a bona fide separate, adequate and independent state ground, namely, Article I, § 8 of the Pennsylvania Constitution, the United States Supreme Court should not undertake to review that Opinion.

As the Opinion of the Pennsylvania Supreme Court in *In re D.M.* is grounded on Article I, § 8 of the Pennsylvania

Constitution, the United States Supreme Court should not undertake to review that Opinion.

The Pennsylvania Supreme Court has said that "the inquiry [in *Terry* cases] is the same under either Article I, § 8 . . . or the Fourth Amendment." *D.M.*, 743 A.2d at 425. Although the test itself – did the police possess reasonable suspicion at the initiation of their investigation? – is congruent, the Pennsylvania Supreme Court has frequently found seizures unconstitutional under Article I, § 8, where this Court has, in similar circumstances, found no seizure, as in the Pennsylvania Supreme Court's "forced abandonment" and "man with gun" decisions, discussed below.

" 'It is fundamental that state courts be left free and unfettered . . . in interpreting their state constitutions.' " *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476 (1983) (*quoting Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). In interpreting the rights of citizens under the state constitution, the Pennsylvania Supreme Court has developed an independent state constitutional jurisprudence under Article I, § 8, the state counterpart to the Fourth Amendment. *See Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991); *see also Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1996); *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068, 1071 (1997) ("the public will receive its full measure of protection by police who act within the restraints imposed on them by Art. I, § 8 of the [Pennsylvania] Constitution and this court's relevant caselaw"); *Commonwealth v. Kue*, 547 Pa. 668, 692 A.2d 1076 (1997) (same, citing *Hawkins*, decided the same day).

As Petitioner notes, the critical question in the instant case is whether the anonymous tip of a "man possibly with a gun" established reasonable suspicion to justify an investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The Pennsylvania Supreme Court's decision, resting upon separate, independent state grounds, located here in Article I, § 8 of the Pennsylvania Constitution, is consistent with that Court's state constitutional jurisprudence.

In answering the question, the Pennsylvania Supreme Court discussed two precedents, *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997), and *Commonwealth v. Cook*, 558 Pa. 50, 735 A.2d 673 (1999), both of which are based on Article I, § 8 of the Pennsylvania Constitution. The Court also referred to another decision, *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068 (1997), which is also an Article I, § 8 case. Thus, the Pennsylvania Supreme Court's analysis of the facts and relevant legal principles relied principally upon state constitutional grounds.[1]

In addition, the Pennsylvania Supreme Court's disposition of the flight issue, discussed more fully below, is consistent with, and a logical outcome of, its "forced abandonment" decisions, a claim this Court has rejected under the Fourth Amendment but which retains its vitality under Article I, § 8 of the Pennsylvania Constitution.

---

[1] Petitioner misstates the case by asserting that the Court "held that the officers violated the Fourth Amendment." Commonwealth's Petition at p. 5. It is revealing that Petitioner cites to no source in the Court's Opinion, for nowhere did the Court limit its holding to the Fourth Amendment.

Commonwealth v. Matos, 543 Pa. 449, 457, 672 A.2d 769, 773 (1996) (rejecting *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), Court held abandonment coerced by unjustified police pursuit; thus, under Article I, § 8, evidence must be suppressed).

In *Matos*, the Court rejected this Court's holding in *Hodari D.* and held that, "due to the heightened privacy considerations in Pennsylvania, a police officer's pursuit of a person fleeing the officer was a seizure for purposes of Article I, § 8 of the Pennsylvania Constitution." *Cook*, 558 Pa. at 55, 735 A.2d at 675. In the three cases consolidated for appeal in *Matos*, the Court distinguished "mere encounters" and "coercive stops," and held that, under the Pennsylvania Constitution, pursuit by police constitutes a "seizure" that must be justified by the information available to the police at the outset of the chase. At the heart of the Court's decision was its statement that "the law of this Commonwealth has always maintained a strong preference for the rights of the individual in the face of coercive state action." *Matos*, 543 Pa. at 457, 672 A.2d at 773.

Under *Matos*, flight precipitated by unjustified police conduct adds nothing to the determination of reasonable suspicion because it occurs only after the police have initiated a seizure without reasonable suspicion. In *D.M.*, the Court found this distinction between federal and Pennsylvania analyses to be critical: where police approaching a suspect to investigate an anonymous tip of a man "possibly" with a gun observed no suspicious conduct prior to the suspect's flight, their pursuit elevated the situation into a seizure under Article I, § 8, without reasonable suspicion. Thus, under Pennsylvania state law, the flight here occurred only after the seizure

had been initiated, and accordingly, again under state law, could not justify the seizure.

In *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1996), the Article I, § 8 reasonable suspicion precedent that the Court found controlling in *D.M.*, the Court held that contraband had been uncovered by the police through forced abandonment, a position that, in *Hodari D.*, this Court had rejected five years earlier as a matter of federal law. *Jackson*, which relied on *Matos*, was clearly decided under state constitutional law. Similarly, *D.M.*, in which the Pennsylvania Supreme Court relied on and cited *Jackson*, rests on an identical state constitutional analysis.

In the second case relied upon in *D.M.*, *Commonwealth v. Cook*, 558 Pa. 50, 735 A.2d 673 (1999), where only an Article I, § 8 claim was addressed, the Pennsylvania Supreme Court found that, under its state constitutional analysis, flight was indeed relevant where the police already possessed reasonable suspicion, based on personal observations of suspicious conduct, before the suspect began to flee. *Cook*, 558 Pa. at 60, 735 A.2d at 678. In the case at bar, however, where the anonymous tip of a man "possibly" with a gun could not establish reasonable suspicion, the seizure precipitated and predated the flight, rather than the other way around. What is significant, however, is that, although the Court distinguished the facts in *D.M.* from the facts in *Cook*, the Court employed the same state constitutional analysis to reach its holding in *D.M.*

It is an inescapable conclusion that the Pennsylvania Supreme Court relied on Article I, § 8 to reach its judgment,

and this Court should not undertake to review that state constitutional decision.

B. The Pennsylvania Supreme Court properly held that the police violated Respondent's rights under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment by initiating an investigatory stop based on an anonymous tip of a man "possibly with a gun."

Under Pennsylvania state constitutional law, the anonymous tip in this case, which contained only a cursory description of a black male wearing common clothing and "possibly" in possession of a gun, did not and could not provide the police with reasonable suspicion that Respondent was engaged in criminal conduct. *See Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997); *Commonwealth v. Hawkins*, 547 Pa. 652, 692 A.2d 1068, 1071 (1997); *Commonwealth v. Kue*, 547 Pa. 668, 692 A.2d 1076 (1997). Despite Petitioner's alarmist and disparaging portrayal of the Pennsylvania Supreme Court's analysis as "complaining" or "idiosyncratic", *see* Commonwealth's Petition at pp. 7 and 18, this Court recently adopted precisely the same analysis in *Florida v. J.L.*, No. 98-1993, 2000 U.S. LEXIS 2345 (U.S. March 28, 2000).

Respondent agrees with Petitioner in one respect. In its Petition, the Commonwealth of Pennsylvania stated:

> This same issue was argued before this Court in *Florida v. J.L.*, No. 98-1993 on February 29 of this year and this Court's ruling in *J.L.* will be determinative of this issue. . . .

Commonwealth's Petition at p. 3. On March 28, 2000, this Court, employing an almost identical analysis, held in *J.L.*

that an anonymous tip of a man with a gun does not establish reasonable suspicion.

Consistent with its previous "man with gun" cases, the Pennsylvania Supreme Court properly found in *D.M.* that the cursory, anonymous tip regarding a black male, dressed in a white t-shirt, sneakers, and blue jeans, "possibly" armed, standing on a public street at 6 p.m. on a June evening, and observable by anyone in the neighborhood, *a fortiori* provided no reasonable basis for concluding that criminal activity might be afoot. The Court's decision is also entirely consistent with this Court's unanimous holding in *J.L.*

Moreover, the unique facts of the instant case, centered on an anonymous tip of a man "possibly" with a gun, would extend the "automatic firearm exception" this Court rejected in *J.L.* Obviously, a tip based on conjecture or hunch of a "possible" gun carries even less indicia of factual reliability. In light of the holding in *J.L.*, which Petitioner concedes is controlling, an anonymous tip of a man *possibly* with a gun, the critical fact of this case, is even less compelling a basis for initiating an investigatory detention – or for this Court's discretionary review.

In *D.M.*, one dissenter agreed with the majority that there was no "firearm exception" to *Terry*. The two other dissenters argued that such an exception should be created, but, in light of *J.L.*, this position is no longer tenable, under either state or federal constitutional law. Thus, in its threshold issue, Petitioner is in essence asking this Court to extend a rule of law that this Court has just rejected unanimously, and which a strong majority of the Pennsylvania Supreme Court likewise disapproves.

C. The Pennsylvania Supreme Court properly held that, under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment, flight added no legal justification to the police investigation of a suspect where the officers acted on the basis of an anonymous tip of a man "possibly with a gun" and the flight occurred only after the police had initiated a seizure.

Attempting to depict the instant case as controlled by *Illinois v. Wardlow*, ___ U.S. ___, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000), Petitioner misstates the facts by characterizing Respondent's flight as "unprovoked." Commonwealth's Petition at p. 19. This mischaracterization ignores the fact that the Pennsylvania Supreme Court determined that, under Article I, § 8, an unjustified seizure had already occurred prior to the flight.

In *Wardlow*, the police had not yet initiated their investigation when the suspect fled; however, in *D.M.*, the Court held that, under the state constitutional analysis, the officers had already effectuated a seizure, and it was their unjustified conduct that precipitated the flight. This analysis is entirely consistent with the Pennsylvania Supreme Court's prior Article I, § 8 decisions. *See, e.g., Matos, supra; Commonwealth v. Jeffries*, 454 Pa. 320, 325, 311 A.2d 914, 917 (1973) (rejecting argument that flight justified *Terry* stop where no facts "would give rise to the reasonable belief Jeffries was involved in criminal activity").

Nor is *D.M.* incompatible with *Wardlow*. Central to that case were several attendant circumstances, **none of which are present here**: the incident in *Wardlow* took place in an area known for heavy drug trafficking; the officers anticipated encountering a large number of people involved in various facets of the drug trade; and the officers decided to investigate Wardlow, about whom

they had no prior information to make him a particular target, only after he fled from them. *Wardlow*, 120 S. Ct. at 676.

The absence of these additional circumstances readily distinguishes *D.M.* from *Wardlow*: in *D.M.*, there was no evidence that the neighborhood was a high crime area; the officer had no basis for believing that most of the citizens he would likely encounter were involved in criminal activity; and before he fled, Respondent had already been targeted by the police, albeit for a legally insufficient reason, the anonymous tip of a man **possibly** with a gun. Most significantly, however, Respondent's flight was not unprovoked; rather, as the Pennsylvania Supreme Court held under Article I, § 8, it had been precipitated by the officers' authority and their command to Respondent to stop and submit to their investigation, which constituted an illegal detention under Article I, § 8. Even with these attendant circumstances and the anonymous tip of a man "possibly" with a gun, *D.M.* is not inconsistent with *Wardlow*.

Petitioner also misstates the Pennsylvania Supreme Court's consideration of flight as a factor in determining reasonable suspicion by characterizing it as a complete dismissal. Contrary to Petitioner's assertion that the Court held "that flight is not a relevant factor," Commonwealth's Petition at pp. 3-4, the Court simply held, consistent with state constitutional principles governing when a seizure has occurred, that Respondent's "post-seizure" flight was irrelevant because reasonable suspicion could not be bootstrapped by his subsequent flight.

In *D.M.*, the Court held, that, based on the anonymous tip of a man with a gun,

> the officer's suspicions were not aroused at the time he initially approached appellant. As indicated previously, the tip and existing circumstances when Officer Frazier arrived at the scene failed to provide any facts that would lead an officer to reasonably suspect that criminal activity was afoot. In the absence of any factors indicating that the officer suspected criminal activity was afoot, the "additional" factor of flight is not relevant to the determination of reasonable suspicion.

D.M., 743 A.2d at 426. This holding is not the wholesale repudiation of flight's relevance with which Petitioner wishes to alarm this Court. Indeed, the Pennsylvania Supreme Court routinely applies flight as a relevant factor, as it did in one of the two cases it analyzed in *D.M.*, *Commonwealth v. Cook*, which was decided just five months earlier. Thus, Petitioner's misleading characterization of the *D.M.* Court's treatment of flight provides no basis for this Court's review.

CONCLUSION

In the case at bar, the conjectural speculation inherent in an anonymous tip of a man "possibly" with a gun raises no compelling constitutional issues. The Pennsylvania Supreme Court has not decided an important federal question nor done so in a way inconsistent with relevant decisions of this Court. Indeed, the peculiarity of

the instant facts implicates no common occurrence that must be resolved by the exercise of this Court's authority.

Wherefore, for the above argued reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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NO. 99-1583

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
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v.

D.M.,
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On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does this Court lack jurisdiction to consider the ruling of the Pennsylvania Supreme Court in this case, where that Court's decision was based solely upon its interpretation of *Terry v. Ohio*, and nothing even remotely resembling a plain statement of an independent state law basis for the decision appears anywhere in the state court opinion?

2. Is the Pennsylvania Supreme Court's preliminary holding about an anonymous "man with a gun" tip dispositive, where the state court then went on to hold, erroneously, that flight is "not relevant" in assessing reasonable suspicion for *Terry* stops?

3. May respondent avoid the inescapable effect of *Wardlow* on the Pennsylvania Supreme Court's flight analysis by simply inventing an alternate state law basis for the decision in this case that was not a part of the state court's reasoning and was never at issue?

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REASONS FOR GRANTING THE WRIT

Respondent asserts three reasons for denying the writ. First, he claims that the state court decided this case under the state constitution. Second, he argues that the issue presented has already been decided by this Court and thus review is unwarranted here. Finally, he attempts to mislead this Court as to the nature of the state court's holding in an attempt to reconcile this case with this Court's decision in *Wardlow*. Respondent's first argument is simply incorrect; his second ignores the crucial factor which distinguishes this case from *J.L.*; and his third argument is based upon a completely false representation concerning what the state court held in this case. The state court's actual holding is insupportable under this Court's recent decision in *Wardlow*.

1. This Court has jurisdiction: the state court never asserted an independent state ground, and expressly relied on *Terry*.

Respondent asserts that this Court should not grant review in this case because the Pennsylvania Supreme Court's decision was "grounded" on the state constitution and not federal law. Wholly lacking in respondent's protracted jurisdictional argument is any acknowledgment of the controlling principles under which this determination is to be made. If respondent were correct, however, he would not need any extended discussion of the issue; he would simply be able to point to a plain statement by the state court that its decision was exclusively based upon state law.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court adopted the following test for determining whether a state court decision rests upon an adequate and independent state law ground:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used for the purposes of guidance, and do not themselves compel the result that the court reached.

Id., 463 U.S. at 1040-1041. *See also Arizona v. Evans*, 514 U.S. 1, 7-10 (1995).

Despite this Court's clearly articulated jurisdictional standard, respondent does not claim a "plain statement." In fact, he carefully avoids mention of any form of those words. Respondent's failure to identify the necessary statement (or even to acknowledge the requirement for one) is hardly accidental. There is no statement, plain or otherwise, placing the state court's holding on independent state grounds.

Indeed, a review of the Pennsylvania Supreme Court's opinion reveals the opposite to be true. Contrary to respondent's representations, the "sole issue" presented in the case was whether police had reasonable suspicion to stop respondent. App. 1. In deciding this issue, the Pennsylvania Supreme Court expressly relied upon this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), which was described in its opinion as "the seminal case on reasonable suspicion." App. 4. The state court went on to explicitly declare: "In

determining whether reasonable suspicion exists for a *Terry* stop, **the inquiry is the same** under Article I, Section 8 of the Pennsylvania Constitution or the Fourth Amendment of the United States Constitution." *Id.* (emphasis added). Thus, the only plain statement provided by the Pennsylvania Supreme Court was that it is relying on federal law to resolve the sole issue presented in the case.[1]

In the face of the Pennsylvania Supreme Court's explicit declaration that it was following *Terry*, respondent attempts to create a state court basis for the decision in this case by asserting that in other cases, which were cited in this case, the court had an independent state law ground for its decision. Respondent's point is a total non-sequitur. For purposes of jurisdiction, to assert that a state court relied on an independent state ground in **other cases** is simply meaningless.[2]

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[1] The Pennsylvania Supreme Court knows how to state an independent state ground. Indeed, this Court recently reiterated the concept directly to that court. In *Pennsylvania v. Labron*, 518 U.S. 938 (1996), the main argument of the respondent was jurisdictional; the state court, he claimed, relied on the state constitution. This Court rejected that argument. Although it referred to state jurisprudence, the state court had made no "plain statement" that its numerous citations to federal authority were "being used only for the purpose of guidance, and d[id] not themselves compel the result[.]" 518 U.S. at 940-41. *Labron* was decided on July 1, 1996, over three years before the state court decided the instant case on December 27, 1999. The Pennsylvania Supreme Court, therefore, obviously knows by now how to articulate an independent state ground. Yet it did not do so here.

[2] Respondent finds it significant that, in addition to *Terry*, the state court relied upon its own decisions in *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997) and *Commonwealth v. Cook*, 558 Pa. 50, 735 A.2d 673 (1999). The decisions in both

Jurisdiction is not in issue here.

2. Respondent's suggestion that *J.L.* is dispositive in this case ignores the additional factor of flight, which this Court, in *Wardlow*, has deemed to be a significant factor in determining the existence of reasonable suspicion.

Cook and *Jackson*, however, both reiterate the Pennsylvania Supreme Court's long expressed position that for purposes of state constitutional law the reasonable suspicion standard is the same as that under the Fourth Amendment -- *Terry* is the standard. Thus, in *Cook*, the Court expressly noted that it adopted the *Terry* standard in *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969) and has "consistently followed *Terry* in stop and frisk cases, including those arising under Article I, § 8 of the Pennsylvania Constitution." 735 A.2d at 676-677. The same pronouncement was also made by the Court in *Jackson*. 698 A.2d at 573. These cases further illustrate that the state court decision in this case was based upon *Terry* and not some unspecified state law ground.

Respondent also refers to cases in which the Pennsylvania Supreme Court has adopted a different standard for determining whether a seizure has occurred under state law in cases of "coerced abandonment," and he argues that those cases are consistent with the state court's decision in this case. As will be more fully discussed in response to respondent's third argument, there was no issue of "coerced abandonment" in this case. Respondent never abandoned the gun he was carrying; it was seized when he was stopped by the police officer. The Pennsylvania Supreme Court never held, as is falsely represented to this Court, that respondent was seized before he fled from police. This was not an issue in the case, nor was it ever argued in the Common Pleas or Superior Court. The only issue presented to the state courts was whether reasonable suspicion was established under *Terry* by the combination of the anonymous tip of a "man with a gun" and respondent's flight from police.

Still clinging to his fictional claim that this case was decided on state law grounds, respondent finally gets around to mentioning this Court's recent decision in *Florida v. J.L.*, No. 98-1993, 2000 U.S. LEXIS 2345 (decided March 28, 2000) on page eight of his brief in opposition to the petition for writ of certiorari. Indeed, respondent's sparse reference to *J.L.* serves only to refute his contention that the Pennsylvania Supreme Court's decision in this case is "entirely consistent" with *J.L.* (Respondent's brief, 9).

Petitioner acknowledges that the first reason set forth in its petition for requesting review by this Court, that an anonymous tip of a "man with a gun" would alone be an adequate basis for a *Terry* stop, is no longer tenable in light of *J.L.*. However, the resolution of this issue is not dispositive of this case.[3] Petitioner's second reason for requesting this Court to grant a writ of certiorari in this case remains both viable and compelling. The Pennsylvania Supreme Court held that flight, a factor this Court considers to be significant in determining the existence of reasonable suspicion, is irrelevant unless first preceded by other suspicious conduct. Thus, in Pennsylvania, police are not allowed to consider a suspect's flight to be a significant factor under *Terry* unless

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[3] The suspect in *J.L.* was stopped solely on the basis of his matching the description provided in an anonymous tip. Respondent in this case, however, was stopped not just on the basis of a tip, but only after he ran away when the police officer investigating the tip tried to speak to him. This crucial element of flight, which was not present in *J.L.*, was erroneously dismissed by the state court as irrelevant under *Terry*. Here, the combined circumstances of the anonymous tip, respondent's matching the tip's description at the exact location reported, and his highly suspicious flight when the officer spoke to him clearly established the requisite reasonable suspicion under *Terry*. This case, therefore, is fundamentally different from *J.L.*.

they already have observed independently suspicious conduct. Of course, if they have already observed other suspicious conduct, the flight would be superfluous.

The flight in response to the police officer's presence, as this Court recently made clear in *Illinois v. Wardlow*, No. 98-1036, 2000 U.S. LEXIS 504 (decided January 12, 2000), was suspicious conduct by respondent that the officer was entitled to rely upon in deciding to make a *Terry* stop. Under *Wardlow*, therefore, flight, standing alone, is a significant factor in determining the existence of reasonable suspicion under *Terry*. In this case, however, the Pennsylvania Supreme Court reached the opposite conclusion and held that flight is irrelevant under *Terry* unless it is preceded by some other suspicious behavior. The reasoning of the state court in this case is clearly in conflict with *Wardlow* and should not be permitted to stand.

3. The Pennsylvania Supreme Court never held that respondent was seized before he fled from police; this blatantly false assertion can only be construed as a tacit concession that the state court decision in this case is incompatible with this Court's decision in *Wardlow*.

Respondent, in an effort to avoid the inescapable conclusion that *Wardlow* renders the state court decision in this case wholly invalid, manufactures a new holding for the case, based on an issue never raised nor addressed by the state court, and which simply has nothing to do with this case. Petitioner falsely represents that "the Pennsylvania Supreme Court determined that, under Article I, § 8, an unjustified seizure had already occurred prior to the flight." (Respondent's brief, 10). There was no such holding in this case. The Pennsylvania Supreme Court did not even imply that a

seizure had occurred prior to respondent's flight, let alone explicitly hold so.

Equally puzzling is respondent's assertion that the Pennsylvania Supreme Court's rejection of flight as a relevant factor under *Terry* is somehow consistent with the court's state law "coerced abandonment" decisions in *Commonwealth v. Matos*, 543 Pa. 449, 672 A.2d 769 (1996);[4] and *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973). There was no abandonment by respondent of his gun in this case -- let alone any coerced abandonment. Nor was there any issue presented to the state courts other than the existence of reasonable suspicion to support the stop of respondent. Tellingly, despite respondent's insistence that *Matos* and *Jeffries* support the phantom holding he has constructed, the Pennsylvania Supreme Court did not cite to either of these cases in its opinion here. These cases lend no support whatsoever to the court's actual holding that respondent's flight in this case was irrelevant under *Terry*.[5]

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[4] In *Matos*, the Pennsylvania Supreme Court rejected this Court's decision in *California v. Hodari D.*, 499 U.S. 621 (1991) and held under state law that police pursuit of a fleeing suspect is a seizure, which must be supported by probable cause or reasonable suspicion to allow police to retrieve contraband that has been discarded by the fleeing suspect. Here, of course, respondent's flight preceded the police pursuit and, thus, under state law he could not have been seized until after he fled. Thus, there was no issue in this case as to whether respondent was seized prior to his flight, and all three state courts addressed the issue of flight in determining whether reasonable suspicion was established to stop respondent. There was no issue litigated, at any stage of the state court proceedings in this case, regarding when the seizure occurred.

[5] Respondent claims that he was illegally seized "by the officers' authority and their command to Respondent to stop and

The Pennsylvania Supreme Court unquestionably

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submit to their investigation" (Respondent's brief, 11). This assertion misstates the facts of this case. The only words spoken by the officer were "come here." App. 2; App. 20; App. 33. There was no command to stop and submit to investigation, as respondent claims. The officer arrived on the scene and simply said, "come here;" in response, respondent fled. Indeed, respondent never argued in the state courts that he was unlawfully seized when the officer asked him to "come here," and the Pennsylvania Supreme Court never addressed any such notion.

In any event, under even Pennsylvania law a police officer may "initiate an encounter with a suspect and request information absent any level of suspicion...." *Commonwealth v. Matos*, 543 Pa. 449, 461, 672 A.2d 769 (1996). "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Commonwealth v. Hall*, 475 Pa. 482, 488, 380 A.2d 1238 (1977). Obviously, the officer had to say something if he wished to talk to respondent. The officer's mere use of the words "come here" to convey that request did not constitute a seizure. Absent an "exercise of force," there is no seizure. *Commonwealth v. Jones*, 474 Pa. 364, 372, 378 A.2d 835 (1977), *cert. denied*, 435 U.S. 947 (1978). *Accord Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984)("The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest."); *United States v. Angell*, 11 F.3d 806, 809-810 (8th Cir. 1993), *cert. denied*, 512 U.S. 1239 (1994)(no seizure occurred where police officer shined flashlight on occupants of vehicle stopped at stop sign and said, "Stay there, I want to talk to you"); *United States v. Moreno*, 897 F.2d 26, 30-31 (2nd Cir. 1990), *cert. denied*, 497 U.S. 1009 (1990) (no seizure where law enforcement agents approached appellant, displayed badge, and said, "come over here for a second"). Thus, in addition to being a non-existent issue in the case, respondent's fabricated state law rationale is an incorrect statement of Pennsylvania law as well.

considered whether flight was an "'additional' factor" in determining the existence of reasonable suspicion, but found it to be irrelevant because the flight was not preceded by other suspicious conduct on respondent's part. *See* App. 6-7. This holding cannot be reconciled with this Court's decision in *Wardlow*. The only suspicious conduct observed by police in *Wardlow* was flight.[6] That combined with Wardlow's mere presence in a high crime area was deemed by this Court to meet the reasonable suspicion standard of *Terry*.

Respondent's attempt to distinguish *Wardlow* from this case by asserting that the flight in *Wardlow* was unprovoked, while respondent's flight was provoked by police, is based on his fabricated notion that he was seized prior to his flight and, for this reason alone, fails outright. Both respondent and Wardlow fled for the same reason: to avoid scrutiny by the police. In this sense, flight was provoked by the

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[6] Respondent simply fails to confront the fact that the police had no reason to suspect Wardlow of any wrongdoing before they saw him flee, and that such flight could support a finding of reasonable suspicion. Here, there was even more: the police had information from an anonymous source that respondent had a gun. While this tip was not enough by itself for a stop, respondent's flight certainly provided corroboration for the anonymous tip. Respondent's immediate flight suggests that he knew that he had given reason for persons to know he was armed: police were not there by coincidence. By taking flight at the arrival of police, respondent exhibited the kind of corroborative, suspicious conduct that was absent in *J.L.* The fact that there was no evidence that respondent was in a high crime area is not significant. That was the only other factor present in *Wardlow*. Here, by contrast, the police had specific information -- albeit from an anonymous source -- that respondent was carrying a concealed weapon on a public street. His highly suspicious flight served to confirm the anonymous tip. If anything, the police in this case had a stronger basis for a *Terry* stop than the officers in *Wardlow*.

presence of the police and a desire not to have illegal conduct detected. This, however, is precisely why the flight is such a significant factor in the determination of reasonable suspicion. When police drive down a street, or approach a person to ask a question, and their presence is met with headlong flight, it is entirely reasonable for them to draw the conclusion that the flight is suspicious. Thus, when the officer in this case attempted to speak with respondent about the anonymous gun tip and respondent immediately ran away, it was reasonable for the officer to conclude that he was warranted in conducting a *Terry* stop.

The Pennsylvania Supreme Court's pronouncement that, under *Terry*, flight cannot be considered until police have observed other suspicious conduct is an erroneous interpretation of federal constitutional law. This decision, moreover, essentially prevents police officers in Pennsylvania from giving meaningful consideration to a suspect's sudden flight in determining whether to make a stop under *Terry*, despite this Court's unequivocal pronouncement that flight is a highly relevant factor in the *Terry* analysis.

The writ should therefore be granted.

CONCLUSION

Wherefore, the Commonwealth of Pennsylvania respectfully requests this Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,

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